R

108 - 269

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 234.

JOHN H. ROUNTREE, PLAINTIFF IN ERROR,

VS.

ERNEST F. SMITH AND MILTON C. LIGHTNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED JUNE 29, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 234.

JOHN H. ROUNTREE, PLAINTIFF IN ERROR,

vs.

ERNEST F. SMITH AND MILTON C. LIGHTNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

INDEX.

	Original.	Print.
Writ of error	1	1
Præcipe	2	1
Security for costs	3	2
Complaint	4	2
Summons	8	5
Marshal's return	9	5
Answer	9	5
Trial	17	9
Verdict and judgment	17	9
Bill of exceptions	19	10
Testimony of Ernest F. Smith	20	11
Milton C. Lightner	87	51
Ernest F. Smith (recalled)	100	57
John H. Rountree	101	58
Ernest F. Smith (recalled)	111	63
Milton C. Lightner (recalled)	112	63
John H. Rountree (recalled)	113	64
Extract from rules of Board of Trade of Chicago	114	64
Questions submitted to jury	118	66
Instructions to jury	119	67
Instructions asked by defendant	127	70
Exceptions to charge	128	71
Bill of exceptions signed	134	74
Petition for writ of error and assignment	135	74
Bond on appeal	137	75
Approval of same	139	77
Clerk's certificate	139	77
Citation	141	77

1 Supreme Court of the United States of America.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the western district of Wisconsin, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Ernest F. Smith and Milton C. Lightner and John H. Rountree, a manifest error hath intervened, to the great damage of the said John H. Rountree, as by his complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the tenth day of February, in the year of our Lord 1880.

[SEAL.] F. M. STEWART,
Cl'k Cir. Court, W. D. Wis.

WILLIAM E. CARTER,
Attorney for Plaintiff in Error.

The return of the within writ appears by the schedule hereto annexed.
R. BUNN, *Judge.*

1½ The return of the judges of the circuit court of the United States for the western district of Wisconsin.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office, in the city of Madison, this 15th day of May, A. D. 1880, and of our Independence the 104th year.

[SEAL.] F. M. STEWART,
Clerk Circuit Court, West'n Dist. Wis.

2 UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

At a special term of the circuit court of the United States of America for the western district of Wisconsin, begun and held according to law at the city of Madison, in said district, on the first Monday (being the second day) of December, A. D. 1879. Present and presiding, the Hon. Romanzo Bunn, judge. Among other, the following proceedings were had, to wit:

ERNEST F. SMITH AND MILTON C. LIGHTNER
vs.
JOHN H. ROUNTREE.
} At law.

Be it remembered that heretofore, to wit, on the 8th day of August, A.

D. 1879, came the above-named plaintiffs, by their attorneys, Gregory & Gregory and Higgins, Furber and Cothran, and filed their præcipe herein for a summons, as follows, to wit:

Præcipe.

United States circuit court, western district of Wisconsin.

ERNEST F. SMITH AND MILTON C. LIGHTNER
vs.
JOHN H. ROUNTREE.

F. M. STEWART, *Clerk:*

SIR: Issue summons in above-entitled action according to above directions.

3 Yours, &c.,

GREGORY AND GREGORY,
Plaintiffs Attorneys.

AUGUST 8TH, 1879.

And at the same time filed security for costs as follows, to wit:

Security for costs.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

Circuit court.

ERNEST F. SMITH ET AL.
vs.
JOHN H. ROUNTREE.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by plaintiffs, hereby agree and stipulate that execution may issue against our property for any costs taxed against them.

Dated this 8th day of August, A. D. 1879.

GREGORY AND GREGORY.

And came said plaintiffs, by their said attorneys, and on the same day filed their complaint herein as follows, viz:

United States circuit court, western district of Wisconsin.

4 ERNEST F. SMITH AND MILTON C. LIGHTNER, plaintiffs,
against
JOHN H. ROUNTREE, DEFENDANT.

Of September term in the year 1879.

WESTERN DISTRICT OF WISCONSIN, *ss:*

Ernest F. Smith, who is a citizen of the State of Illinois, and Milton C. Lightner, who is a citizen of the State of Illinois, complain of John

H. Rountree, who is a citizen of the State of Wisconsin, and, for a first cause of action, allege:

I. That during all the time hereinafter mentioned, they were and are, respectively, citizens of the State of Illinois; that they were, during all the times aforesaid, and now are, partners in business in the city of Chicago, in the State of Illinois, under the name and style of Smith and Lightner, and engaged in purchasing and vending grain, pork, and lard, and transacting a general commission business, as commission merchants.

That the defendant, John H. Rountree, on or about the twenty-ninth day of April, 1879, to wit, at the city of Chicago, in the State of Illinois, became indebted to said plaintiffs as such copartners as aforesaid in the sum of five thousand four hundred twelve dollars and fifty cents, for moneys, between that day and the first day of February, 1879, paid, laid out, and expended by said plaintiffs, to and for the use and benefit of said defendant, and at his special instance and request, and for moneys theretofore and between that day and the first day of February, 1879, lent and advanced by said plaintiffs, as such copartners, as aforesaid, to the 5 said defendant, and at his special instance and request, and for work, labor, and services performed and rendered by said plaintiffs as such copartners as aforesaid, for said defendant at his special instance and request, between the day aforesaid and the first day of February, 1879, which work, labor, and services were reasonably worth the sum of twelve hundred forty-three dollars and seventy-five cents.

That being thus indebted the said defendant did, on or about the twenty-ninth day of April, 1879, promise and agree to repay to the said plaintiffs the said moneys so paid, laid out, and expended and lent and advanced as aforesaid, and to pay for said service the said sum of $1,243.75 whenever thereafterwards requested.

That although often requested so to do, said defendant has not paid the same or any part thereof, but that the same remains and is due and wholly unpaid.

II. And for a second cause of action said plaintiffs allege that the said Ernest F. Smith is a citizen of the State of Illinois, and that the said Milton C. Lightner is a citizen of said State of Illinois, and that the defendant, John H. Rountree, is a citizen of the State of Wisconsin.

That the said plaintiffs during the time hereinafter mentioned were and are copartners in business in the city of Chicago and State of Illinois under the name and style of Smith and Lightner, and engaged in purchasing and vending grain, pork, and lard, and transacting a general commission business as commission merchants.

That on or about the second day of February, 1879, at the city of Chicago aforesaid, said defendant employed said plaintiffs, as such 6 copartners as aforesaid, to purchase large quantities of grain of various kinds and pork and lard for him, and to make thereon certain advances of money to and for the use and benefit of said defendant, and also to make sales of said grain, pork, and lard for him; and that in consideration of such purchases, and making such advances by said plaintiffs to and for the use and benefit of said defendant, and for making such sales, he agreed to pay and allow them certain reasonable commissions by way of compensation on all such purchases so made by them for him, and on all sales so made by them for him as aforesaid.

That under and pursuant to such employment they, said plaintiffs, in good faith and in the usual course of business, purchased for said defendant, at divers times between the first day of February, 1879, and the twenty-ninth day of April, 1879, large quantities of wheat, pork, lard, oats, and corn, to wit, sixteen thousand seven hundred fifty barrels pork, twenty-two hundred fifty tierces of lard, forty thousand bushels of wheat, twenty thousand bushels of oats, and fifty thousand bushels of corn, and made advances thereon for said defendant, which advances amounted in the aggregate to the sum of nine thousand five hundred six dollars and twenty-five cents, and that during the time aforesaid they sold under and pursuant to the directions and authority of said defendant all of said lard, pork, wheat, oats, and corn for said defendant.

That their services in the purchase of said pork, lard, wheat, oats, and corn, and making sales thereof, and in making such advances as aforesaid, were reasonably worth the sum of twelve hundred forty-three dollars and seventy-five cents.

That during the time aforesaid the defendant paid, to apply thereon,
and was credited by said plaintiffs with divers sums of money,
7 amounting in the aggregate to the sum of five thousand three hundred thirty-seven dollars and fifty cents.

That all of said business transactions were concluded by the sale of the part of said property on the 29th day of April, 1879; that on that day, after making such last sale and giving the defendant the benefit of all the credits to which he was entitled, there remained due and owing to said plaintiffs from said defendant for such advances so made as aforesaid, and for their commissions on such purchases and sales as aforesaid, the sum of five thousand four hundred twelve dollars and fifty cents, which now remains due and unpaid.

Wherefore they demand judgment against said defendant for five thousand four hundred twelve dollars and fifty cents, with interest thereon from April 29th, 1879, besides costs.

GREGORY AND GREGORY, &
HIGGINS, FURBER AND COTHRAN,
Plaintiffs' Attorneys.

UNITED STATES OF AMERICA,
Northern District of Illinois,
County of Cook, City of Chicago, ss:

Milton C. Lightner, being duly sworn, deposes and says that he resides in the city of Chicago, in State of Illinois, and in the northern district of Illinois; that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

MILTON C. LIGHTNER.

Subscribed and sworn to before me this 5th day of August, 1879.

[SEAL.]

PHILIP D. HAYNE,
U. S. Com'r, North'n Dist. Ill.

8 Whereupon a summons issued, returnable within twenty days after the service thereof, in words and figures as follows, viz:

Summons.

Cirtuit court of the United States for the western district of Wisconsin.

ERNEST F. SMITH AND MILTON C. LIGHTNER
vs.
JOHN H. ROUNTREE.

The President of the United States of America, to the said defendant:

You are hereby summoned to appear within twenty days after the service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid, and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you. And you are also required to file your answer in said action in the office of the clerk of this court, at the city of Madison, within the time above specified.

The marshal of said district is hereby commanded to serve this summons, and make due return thereto.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Madison, in said western district of Wisconsin, this eighth day of August in the year of our Lord one thousand eight hundred and seventy-nine and of the Independence of the United States the one hundred and fourth.

[L. S.] F. M. STEWART, *Clerk.*

GREGORY AND GREGORY,
Plaintiffs' Attorneys.
P. o. address: Madison, Wis.

9 To which summons is annexed the return thereto by the marshal of said district, viz:

Return to summons.

I hereby depute B. F. Wyne to serve and return this writ. August 8, 1879.

F. W. OAKLEY,
U. S. Marshal.

Served on the within-named John H. Rountree, by showing him this summons and complaint and delivering to him personally a copy thereof, this 11th day of August, A. D. 1879.

F. W. OAKLEY, *Marshal,*
By B. F. WYNE, *Deputy.*

Fees, $12.50.

Subscribed and sworn to before me this 11th day of August, 1880.
[SEAL.] W. E. BELL,
Notary Public, Grant Co., Wis.

And afterwards, to wit, on the 10th day of December, 1879, came the said defendant, by his attorney, William E. Carter, and filed his answer herein as follows, to wit:

Answer.

United States circuit court, western district of Wisconsin.

ERNEST F. SMITH AND MILTON C. LIGHTNER,
plaintiffs,
against
JOHN H. ROUNTREE, DEFENDANT.

10 The defendant above named, answering the complaint of the plaintiffs in this action, says, for answer to the first cause of action therein stated, that he admits, upon information and belief, that the plaintiffs were and are residents and citizens of the city of Chicago, in the State of Illinois, and are and were partners in business under the firm name and style therein stated.

On like information and belief, he denies that they are engaged in the business of purchasing or vending grain, pork, or lard, except as brokers, and upon like information and belief charges that their real business is buying and selling "options," so called, as brokers, for their customers, and otherwise making for such customers illegal and gaming contracts with respect to grain, pork, and lard, and other articles.

He denies that he is now, and that on or about April 29, 1879, he became indebted to the said plaintiffs in the sum of five thousand four hundred twelve dollars and fifty cents, as charged in said complaint, or in any other sum of money whatever for moneys laid out or expended by them, or either of them, for him or for his use and benefit, at his instance or request, or otherwise, or for moneys advanced or lent by them to him, or for work, labor, or services performed or rendered by them for him, and he denies that he is now, or was at the time in said complaint stated, indebted to the plaintiffs in any sum of money whatever, in any manner or for any cause whatever. He denies that the plaintiffs, or either of them, have at any time laid out or expended for him, or lent or advanced to him, any moneys whatever, at any time, which he has not repaid to them, or have ever performed any services for him for which he has not fully paid and satisfied them. And he denies that he ever has, at any
11 time, promised or agreed to pay to said plaintiffs, or either of them, any of the sums of money in the first cause of action stated or referred to.

And for answer to the second cause of action stated and set out in said complaint this defendant says that he admits that said plaintiffs are citizens of said State of Illinois, and reside at Chicago, in said State; that they are partners doing business *doing business* there under the said firm name of Smith and Lightner.

He admits that some time in the month of February, 1879, he employed the said plaintiffs to act for him as brokers in said city of Chicago, in said State of Illinois, and to purchase for him, with a large sum of money that he had placed in their hands, certain options (as he is informed and believes such contracts are called); that is to say, he was informed by them, and upon their representation believed, that certain articles, that is

to say, wheat, oats, corn, lard, and pork would probably and almost certainly bear a higher price in the market within a short time than they then bore in such market. That by making contracts agreeing in form to purchase such articles for future delivery at the end of said time above named he would, without receiving or handling, or actually purchasing or paying for the said articles, or any of them, *he would* realize large profits from the difference between the price said articles then bore in the market and the price they would probably bear at the end of the time aforesaid; that it would not be necessary, nor was it expected, or in any way understood, that either this defendant or the plaintiffs as his brokers should ever actually see, touch, handle, pay for, or own, receive, or possess any of
the said articles. That the large sums of money placed by this
12 defendant in the hands of said plaintiffs should be used to keep
good the margins so called upon the said articles purchased; that
is to say, said plaintiffs were to purchase, in their own names, the said "options," but the same were to be so purchased and held by them for the use and benefit of this defendant. If the said articles should rise and increase in value the said profits should be his, and if they should decrease in value the loss would fall on him.

That said plaintiffs should so purchase such articles for such future delivery to a nominal amount of many times the money so placed by this defendant in their hands. The said sum of money so placed by this defendant in the hands of said plaintiffs being equal to about per cent. of the whole nominal value of the said articles so to be bought for future delivery as aforesaid, and the said moneys were to be held by said plaintiffs to protect them from loss in case of a depreciation in value of said articles, and the same was adjudged and deemed by them sufficient for that purpose. That afterwards and during the month of February, 1879, this defendant placed in the hands of said plaintiffs certain other large sums of money with which to purchase other options, in all amounting, including said moneys so first placed in their hands as aforesaid, to the sum of about three thousand one hundred and fifty dollars. That all of said moneys were paid by this defendant to them, to be used and were in fact used as he is informed, solely for the purpose of making and keeping good the "margins" so called, to protect said plaintiffs from loss in case of depreciation in the market value of such articles so to be bought by them on his
account as aforesaid. That this defendant has no knowledge or
13 information sufficient to form a belief as to whether the statement
in said complaint contained of articles bought by said plaintiffs for
him is a true statement of the amount of such articles actually purchased or not and he therefore denies the same and asks that said plaintiffs may be required to make proofs thereof and of the prices agreed to be paid therefor, and the prices for which the same was sold if it was ever sold. That on the 11th day of March, 1879, he gave said plaintiffs notice that he had no more money to put up or pay over for margins, and that he would not pay or advance another dollar, or invest, or be, or become liable for another dollar in or about the transactions or any of them. That as he is informed and believes, all of the articles bought or agreed to be bought or bargained for by said plaintiffs for him or on his account, were bought and carried in the names of said plaintiffs and not in the name of this defendant; that it was within their power at any time to close out and end the said transactions.

That if they had done so at or about the time of the giving said notice to them by this defendant, as they might and could have done, and as it was their duty to do, the moneys then in their hands, placed there by this defendant as aforesaid, for the purpose aforesaid, was as he verily believes more than sufficient to secure them against any and all loss from depreciation in the value of such articles, and to pay to said plaintiffs all just and reasonable charges for services rendered by them (if any), in and about the said transactions, and each and all of them. That from that time to this, defendant has refused to pay, or advance, or become liable to pay any more money to said plaintiffs, or otherwise, for or on account of said 14 transactions or any of them, and has claimed and insisted, and now claims and insists, that from the date of his said notice to said plaintiffs he was and is not liable to pay or advance to them any other or further sum of money whatever over and above the sum of money the plaintiffs then had in their hands which belonged to him. That he has been informed by the said plaintiffs that they did not close out the said transactions at or about the time he gave them the said notice as above stated, but continued the said transactions until all the moneys placed by him in their hands as aforesaid were absorbed and lost by the continued depreciation in the market price of the said articles, and that they lost moneys at the said transaction by reason of such depreciation, which moneys they have called on this defendant to repay to them, and which he is informed are the same moneys sued for in both the causes of action set out in the said complaint. The defendant says that whether they did so continue the said transactions, and lose money thereby, he has no knowledge or information sufficient to form a belief, and he therefore denies the same. He further denies that he is indebted to them in any sum of money whatever for any of the causes, matters, or things, or on any of the accounts in the second cause of action stated, for services, advances, or otherwise, and says, on information and belief, that if they ever made any advances, or rendered any services for or to him, that he has fully paid and satisfied them therefor.

And for answer to both the causes of action in said complaint stated this defendent says that all of the said transactions between him and the said plaintiffs and all of the transactions out of which the said causes of action and each of them arose were gambling transactions in the price 15 of the commodities which the said plaintiffs bought or purported to buy on behalf or on account of this defendent. That it was never intended or expected by this defendant or said plaintiffs, or the persons from whom they purported to buy the said articles named in the said complaint, that any of the said articles or any part of any of them should be delivered by said sellers to said plaintiffs or to this defendant. That the only contract, agreement, or understanding between this defendant and the said plaintiffs and, as he is informed and believes, between said plaintiffs and such sellers was, that in case of default in keeping margins good, and also at the time named in the contract or agreement of purchase and sale of such articles for delivery of such articles, such contracts were to be settled and closed on the basis of the difference between the then market price of such articles and the price which the buyer had previously agreed to pay for them at the time of such delivery.

That if the current market price of such articles was greater on the day of such settlement than the price agreed to be paid by the buyer to the seller therefor, then the seller was to pay to the buyer a sum of money equal to such difference, while if the current market price was then less than such agreed price, then the buyer was to pay to the seller a sum equal to such difference. That none of the parties to any of the said contracts ever performed or expected or intented to perform any of the said contracts to deliver or receive any of the said articles, or to settle in any other way or any other basis than the payment of such differences, and if said plaintiffs have paid or advanced for him any moneys or done or performed 16 any services, all of which he denies, the same have been paid, advanced, and done in and about such gambling contracts, and the plaintiffs have no lawful claim upon him therefor or on account thereof.

That he placed large sums of money in the hands of said plaintiffs to invest in such contracts and transactions; that they have informed him that all the moneys he so placed in their hands have been sunk and lost in the said transactions; that he has fully paid them for all lawful services performed by them for him, and has repaid to them all advances lawfully advanced to or for him by them, as he is informed and verily believes, and that he is not indebted to said plaintiffs, or either of them, in any sum of money whatever.

Wherefore, by reason of the premises, the defendant demands the judgment of the court that the complaint of the plaintiffs herein be dismissed; that they take nothing by their action herein, and that he recover of them his costs and disbursements herein.

W. E. CARTER,
Defendant's Attorney.

STATE OF WISCONSIN,
Grant County, ss:

John H. Rountree, being duly sworn, on his oath says that he is the defendant in this action; that he knows the contents of the foregoing answer; that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

JOHN H. ROUNTREE.

Sworn and subscribed before me this 29th day of August, 1879.

W. E. CARTER,
U. S. Court Com'r West'n Dist. of Wisconsin.

17 And in said term, to wit, December special term, A. D. 1879, and on the 8th day thereof, viz, on the 10th day of December, A. D. 1879, in the record of the proceedings aforesaid appears the following entry, to wit:

Trial and hearing.

This day came the parties, by their attorneys, and the issue herein came on to be tried; whereupon a jury is ordered to come, who came, to wit, Riley Maneton, H. J. Fisk, N. B. Crampton, F. C. Curtis, J. D. Royce, Lemuel Taylor, C. G. Mayers, David H. Wright, E. K. Felt, L. D. Layton, H. H. Hecox, and A. E. Hazeltine, twelve honest and lawful men of the district, duly empanneled, tried, and sworn, and the trial commenced.

And afterwards, and on the tenth day of said term, to wit, on the 12th day of December, A. D. 1879, in the record of proceedings aforesaid there appears the following entry, to wit:

Verdict and judgment.

This day came the parties by their attorneys, and the trial being concluded the jury is instructed in the law by the court, and retire to consider of their verdict, with instructions to return a special verdict. And the jurors of the jury aforesaid upon their oaths do say: We, the jury sworn and empaneled to try this case, find for the plaintiffs, and assess their damages at the sum of five thousand six hundred and fourteen and $\frac{46}{100}$ dollars. And we further find, in answer to certain special questions submitted to us by the court, as follows:

First. Did the defendant notify the plaintiffs, or either of them, on or about March 11, 1879, that he would not be responsible for any
18 money beyond the amount of money they then had in their hands belonging to him? Answer. Yes.

Second. If he did so notify them or either of them, state, if you are able, whether the amount of money he then had in their hands was sufficient to cover all losses he had then sustained? Answer. We are unable to state.

Third. If you find that the defendant did so notify the plaintiffs as submitted in the first question, was there any mutual understanding or contract between the plaintiffs and defendant on or about March 11th, 1879, that the defendant should not be held liable on the contracts made on his behalf by the plaintiffs beyond the amount of money then already placed by the defendant in the plaintiffs' hands? Answer. No.

Fourth. If you find there was such a contract or understanding between the parties as is mentioned in the last question, did the defendant, by his subsequent acts, declarations, directions, or conduct, waive the same and become liable for further losses incurred over and above the money so placed in plaintiff's hands? Answer. Yes.

F. C. CURTIS, *Foreman.*

Whereupon it is considered and adjudged by the court now here that said plaintiffs do have and recover of said defendant, John H. Rountree, said sum of five thousand six hundred and fourteen dollars and forty-six cents, with forty-six dollars and thirty cents, their costs and disbursements about said suit, and that they have execution therefor.

And came the said defendant by his attorney and moved the court to set aside the verdict, and for a new trial.

And, on the 33d day of said term, to wit, on the 21st day of January, A. D. 1880, in the record of the proceedings aforesaid in said en-
19 titled cause, appears the following order, viz:

This day came the parties by their attorneys, and it is ordered that the stay of proceedings heretofore granted in this cause, staying proceedings herein to enable the defendant to make a case on which to move for a new trial, and in which to prepare and serve a bill of exceptions, is hereby extended till the 15th day of March, 1880.

And afterwards, to wit, on the 37th day of said term, to wit, on the 11th day of February, A. D. 1880, in the record of the proceedings aforesaid, in said entitled cause appears the following entry, viz:

This day came the parties, by their attorneys, and the motion for a new trial was argued. Whereupon it is considered and adjudged that said motion be, and the same is hereby, overruled.

On the hearing of said cause the following exceptions were taken and allowed by the court, and are in the words and figures following, to wit:

Bill of exceptions.

Circuit court of the United States, western district of Wisconsin.

Ernest F. Smith and Milton C. Lightner,
plaintiffs,
vs.
John H. Rountree, defendant.

Be it remembered that at a term of the circuit court of the
20 United States in and for the western district of Wisconsin, begun and held at the court-house of the United States, in the city of Madison, in said district, on the 2d day of December, in the year 1879, and on the 10th day of said month of December, thereupon came the parties to this suit by their respective attorneys, and a jury having been called and sworn to try the issue joined between the said parties by the pleadings in this action,

And thereupon the plaintiffs, to prove and maintain the issues on their part, called as a witness **Ernest F. Smith**, one of the plaintiffs, who, being duly sworn in said cause, testified as follows, to wit:

I reside in Chicago. Am a member of the firm of Smith and Lightner, commission merchants. Firm consists of myself and Milton C. Lightner. We are both members of the Board of Trade of Chicago, which is an incorporated institution doing business there. I have been a member of the board about two years, and Mr. Lightner has been a member longer than I have.

The first I saw Mr. Rountree, to know him, was, I think, on the morning of February 2d, at my father's house in Chicago. My fathers name is Perry H. Smith. I know Rountree's son, living in Chicago. I had an interview with the son that morning about pork; he spoke of his father in connection with pork. Mr. Rountree mentioned the fact that his son had spoken to me about buying pork, and told me to buy 1,000 barrels for him, and I did so. He asked me what margin was necessary for pork; said he could supply the margin. I told him that knowing him as we did (I knew him by reputation) that we were not particular about margins, because we traded for gentlemen who' we knew would not try to stick us in any way for our losses. But he said he would send the margin, and I only asked him for half the ordinary margin, which is a
21 dollar a barrel, but I only asked him for half a dollar a barrel—

$500.00. We purchased a thousand barrels of pork for him on February 3d, and notified him of it by wire and by letter.

Letter shown witness and identified by him as in his handwriting and written to notify defendant of purchase of pork, which letter is as follows:

CHICAGO, *Feb. 3d*, 1879.

J. H. ROUNTREE, Esq., *Platteville:*

DEAR SIR: For your account to-day we bought 750 barrels April pork, 9.72; 250 bbls. @ 9.70. There were a few sales early from 9.65 to 9.70. After we bought m'k't advanced to 9.85; fell off to 9.67½, and closed 9.70 to 9.72½. If you wish to buy more you can wire us, or might leave an order at 10c. decline or 10c. advance. % enclosed.

Yours, truly,

SMITH AND LIGHTNER.

We received a reply to this letter, dated February 4th. This is the letter:

PLATTEVILLE, *Wisconsin*, 2, 4, 1879.

Messrs. SMITH and LIGHTNER,
128 *La Salle st., Chicago, Ills.:*

I reached my home last evening, and by this mail I sent my son, Hon. J. M. Rountree, five hundred dollars to pay you for the mess pork purchased of you (4,000 bbls). I would like to purchase more, provided I could make some money by so doing; also lard, if there is money in it. Keep me daily informed of the market by telegraph, if you think it is necessary, and I will send money directly to you.

Yours, truly,

JOHN H. ROUNTREE.

A correspondence by letter and telegraph between the parties ensued, and the letters and telegrams from both parties were read in evidence. The substance of them, down to February 5th, was instructions by defendant to purchase pork and lard, remittances of money for margins on purchases, and on the part of the plaintiff's notifications of purchases made for defendant, the state of the market and the probabilities, in their opinion, as to future prices of the commodities. On February 5th defendant wrote plaintiffs a letter, found below, of that date, and on Feb'ry 6th, the letter found below of that date, and on Feb'ry 8th, the letter found below of that date, which were produced, and identified by witness. 22

Defendant wrote plaintiffs the following letter:

PLATEVILLE, WIS., *February 5th*, 1879.

Messrs. SMITH AND LIGHTNER,
No. 128 *La Salle st., Chicago, Ills.:*

I have not heard from you to-day. I hoped that I should, either by letter or telegraph. The Evening Journal of yesterday says mess pork advanced 10 c. for April on yesterday, 4th inst. I sent a check yesterday to my son, Hon. J. M. Rountree, for $500 for you. I hope that you received it to-day. Your letter containing price paid for mess pork on Monday for me and price current came yesterday. Purchase for me one thousand barrels mess pork for April and telegraph me and I will forward $500.00 to you.

Yours, truly,

JOHN H. ROUNTREE.

The following letters and telegrams from defendant to plaintiffs were received and read in evidence:

PLATEVILLE, WIS., *Feb'y* 6, 1879.

To SMITH and LIGHTNER, 128 *La Salle st.*:

Purchase best you can two thousand barrels mess pork for me.

JOHN H. ROUNTREE.

PLATTEVILLE, WIS., *Feb'y* 6, 1879.

To SMITH and LIGHTNER, 128 *La Salle st.*:

Yours received; purchase one thousand more; four thousand in all.

JOHN H. ROUNTREE.

23 [Letter.]

PLATTEVILLE, WIS., 2, *6th*, 1879.

Messrs. SMITH and LIGHTNER:
128 *La Salle st., Chicago*:

How many pounds is in a trc. or keg or barrel? How much cash is wanted down on a trc. or 100 lbs.? I am inclined to purchase some lard, but will wait for your answer. I should like to purchase for April delivery. Please to let me hear from you and if you find a good opportunity to make something for me, purchase some, so that I will not have to pay cash more than say $100.00. I wrote yesterday to purchase 1,000 bbl. mess pork, and to day telegraphed to purchase 2,000 bbl. for April. Hope to hear from you again.

Yours,

JOHN H. ROUNTREE.

Defendant wrote plaintiffs the following letter:

PLATTEVILLE, WIS., *Febr'y 7th*, 1879.

Messrs. SMITH and LIGHTNER,
128 *La Salle st., Chicago*:

GENTLEMEN: Herewith I send to you Messrs. I. Hodges & Co. draft No. 37510, to Fifth National Bank, Chicago, for $1,500.00, and properly assigned to you. I understand that pork was not quite so strong yesterday. If any change in price occurs I hope that you will immediately telegraph me of the change; also give me any information that you may think of advantage or interest to me. I would be willing to invest one hundred or two hundred dollars in lard for March or April if you shall see an opportunity to make something and advise me to do so. Now, I depend entirely on your judgment and your advice to me in keeping or selling what I have got, also as to purchasing more. I hope that you will freely advise me, as I rely upon you.

Yours, truly,

JOHN H. ROUNTREE.

24 Telegraph me whenever you think best, freely and fully, and write giving advice. I want to make something and I want you to help me.

J. H. R.

The following telegram and letter from defendant identified and read in evidence:

[Telegram.]

PLATTEVILLE, WIS., *Feb'y* 18, 1880.

To SMITH and LIGHTNER,
128 *La Salle st.*,

Purchase lard for April at margin, eighty thousand pounds for me.

JOHN H. ROUNTREE.

[Letter.]

PLATTEVILLE, WIS., 2, 9*th*, 1879.

Messrs. SMITH and LIGHTNER,
128 *La Salle st., Chicago:*

Could you purchase for me one thousand barrels of mess pork, or more if I wanted you to, for March or April delivery, if I would send you, say $250.00 cash for each 1,000 bbls., and pay the balance of charges when sold; and the same for lard, say $100.00, and balance paid when sold? And what would be the least amount that I could pay on wheat, and the balance when delivered, in April, May, or June?

Please to answer immediately.

Yours, truly,

JOHN H. ROUNTREE.

Plaintiffs wrote to defendant the following letter:

CHICAGO, *Feb'y* 8*th*, 1879.

JOHN H. ROUNTREE, Esq., *Platteville:*

DEAR SIR: Your favor of 7th at hand, enclosing draft for $1,500.00, and we credit your account with same. Lard opened so high this morning, 6.75 for April, that we thought it might break and we could get it cheaper, so we did not buy any. Instead of breaking it advanced steadily to 6.82½. Received your dispatch this p. m. to buy 250 tcs. 25 (80,000) at m'k't, but it was too late, as market had closed. Will buy Monday morning. The feeling here is getting very bullish, and would not be surprised to see a good advance all around. Only 8,000 hogs received to-day. April pork opened this a. m. 9.90, sold up to 10.00, and closed strong at 9.97½; April lard, 6.82½; M'ch wheat, 88⅛. Will telegraph if any change takes place. % enclosed for m'k'ts.

Yours, truly,

SMITH & LIGHTNER.

The following letter from plaintiffs to defendant was identified and read:

CHICAGO, *Feb'y* 10, 1879.

JOHN H. ROUNTREE, Esq., *Platteville, Wis.:*

DEAR SIR: For your ℅ to-day we bought 250 tcs. April lard, 6.97½; market opened so high this a. m. that we thought best to wait, and expected to see a break, but instead continued to advance, so bought the best we could at 6.97½; markets all very strong to-day. April lard closed Saturday 6.80, 6.82½; opened this a. m. at 6.90, 6.92½; advanced rapidly to 7.00; declined to 6.95 to 6.97½, and closed 7.00. April pork closed at 10.25; reported to have sold since 'Change at 10.35. March wheat closed 89¼. May corn, 36⅜. Think corn and wheat and provisions purchase. ℅ enclosed.

Yours, truly,

SMITH AND LIGHTNER.

Defendant wrote plaintiffs the following letter:

PLATTEVILLE, WIS., *Feb'y* 10, 1879.

Messrs. SMITH and LIGHTNER,
128 *La Salle st., Chicago, Ills.:*

Herewith I hand you Messrs. I. Hodges & Co.'s check to 5th Nat'l Bank, Chicago, for two hundred dollars, assigned to you. Purchase lard, provided you think the price is right. I leave that with you to decide.
I want to make some money. If an opportunity occurs, and the
26 price shall be esteemed a good purchase by you, you may purchase
1,000 bbls. pork more. There may be a little drop in a day or two.
Telegraph me each day for this week. What do you think of wheat?

Yours, truly,

JOHN H. ROUNTREE.

The following telegrams from plaintiffs to defendant were received and read in evidence:

CHICAGO, ILL., 2, 10, 1879.
(Rec'd at Platteville same day.)

To JOHN H ROUNTREE:

Bought 250 April lard, 6.97½; market so strong; early thought would break off.

SMITH AND LIGHTNER.

PLATTEVILLE, WIS., *Feb'y* 11, 1870.

To SMITH and LIGHTNER, 128 *La Salle st.:*

What margin shall I send on pork bought?

JOHN H. ROUNTREE.

PLATTEVILLE, WIS., 11, 1879.
(Received at Chicago Feb'y 11.)

To SMITH and LIGHTNER, 128 *La Salle st.:*

If you can purchase two thousand barrels mess pork for less than ten twelve, do so for me. Notify me.

JOHN H. ROUNTREE.

Plaintiffs wrote defendant the following letter:

CHICAGO, *Feb'y* 11*th*, 1879.

JOHN H. ROUNTREE, Esq., *Platteville:*

DEAR SIR: Your favors of the 8th & 10th received to-day, enclosing draft for $200.00, with which we credit your account. For your account to-day we bought 500 bbls. April pork, 10.10; 500, 10.12½, order in letter. Later bought 750, 10.07½, and 250, 10.05, order by telegram to buy 2,000. Supposed the 1,000 already bought was included. April pork opened strong to-day at 10.22½. Large orders to sell in the market soon broke the price to 10.15 & 10.17½; declined from this price gradually to 10.00; then broke to 9.92½; advanced to 10.02½, and closed at 9.97½ b'd. Expect to see higher prices again in a few days. Telegraphed you
27 this p. m. in answer to your telegram, to send $750.00 margin on
2,000 bbls. bought to-day. We will buy additional pork for you, with very small margin, if markets advance. If you should want to buy wheat, will buy ten thousand bushels, $200.00 margin. Wh't market strong to-day, and expect to see higher prices. M'ch opened 89½, declined to 88¾, and closed 89.4. May corn, 36⅜. If anything should occur to affect prices radically, will telegraph you. ℀ enclosed.

Yours, truly,

SMITH AND LIGHTNER.

Defendant sent plaintiffs following letter:

PLATTEVILLE, WIS., 2, 11*th*, 1879.

Messrs. SMITH and LIGHTNER,
128 *La Salle st., Chicago, Ills.:*

GENTLEMEN: I did not ask you what your charges are for investing money in produce, purchasing, selling, &c., &c. You will very much oblige by giving me a detailed statement of your charges under all circumstances, for I may want you to do a good deal for me. I hope you will answer my letter of the 8th inst., as to am'ts which must be paid, &c., &c.

Truly, yours,

JOHN H. ROUNTREE.

Plaintiffs sent defendant the following letter:

CHICAGO, *Feb'y* 12, 1879.

JOHN H. ROUNTREE, Esq.,
Platteville, Wis.:

DEAR SIR: Your letter of 11th at hand and noted. We don't exactly understand what you mean by your questions in letter of 8th: What is the least am't to be paid on wh't, when purchased, and bal. when delivered in Ap'l? We will buy wh't for April (5,000 bushels), at market for $175.00 margin. When wheat is delivered in April will pay for it ourselves,
and charge you eight per cent (8 %) for interest on money (about
28 $4,500.00) and our commission, ¼c., $12.50; insurance, 12.00;
30 days' storage, 1c. bu. per day, $75.00. Would not require any additional margin for carrying cash property, unless m'k't should go against you. It will cost 15c. a barrel to carry cash pork for a month,

and 5c. commission. We will borrow the money and charge interest. No additional margins required unless m'k'ts should go against you. Provisions very weak to day. Yellow-fever reports started people a selling. April sold easy at $10.00; declined to 9.62½ & 9.65. April lard closed 6.72½ to 6.75. Feeling here pretty weak to-day, but do not think it will be long before prices will be up again. a/c enclosed.

Yours, truly,

SMITH & LIGHTNER.

Defendant sent plaintiffs the following letter:

PLATTEVILLE, WISCONSIN, 2, 12, 1879.

Messrs. SMITH and LIGHTNER,
128 *La Salle st., Chicago, Ills.:*

Your telegram to me yesterday said that you had purchased for me 500 bbls. pork, 10.12½; 500 do., 10.10; 750 do., 10.07½; 250 do., 10.05 for April, and later, that sales closed for April at $9.97½. But you did not say what No. of hogs was on the market at the stock yards. I suppose the number must have been large, which was the cause of depressing the pork market. Now, I wish to communicate fully and freely with you, for my interests are largely in your hands, and I do confide in you, and I want you to do for me the very best that can be bone. I do not want to lose my money, and I want you to guard my interests. If you shall be satisfied that the price of pork will go down so that I shall lose money, I want you to telegraph me at once and prepare to sell. I must be and am willing to be governed by your judgment in the matter. I did think that mess pork would advance, even before March came in, to $10.50
29 or even higher, but I am not confident for I am away from all the markets and am influenced from the information that you give me and the prices mess pork sells for in the markets as published in the daily papers. Is it your settled opinion that pork will go higher and how high, or stay about where it is, or go lower? Write me fully or telegraph; yes, telegraph me. I am sorry that I got you to make that last purchase of 2,000 bbls. as the thing looks now, but when I receive your telegram I will know more about it. I send herewith Messrs. J. Hodges & Co. check $375.52 for seven hundred and fifty dollars as you direct 5th Nat'l Bank, Chicago, Ills.

Yours, truly,

JOHN H. ROUNTREE.

Defendant wrote plaintiffs the following letter:

PLATEVIILE, MISS., *Febry 15th*, 1879.

Messrs. SMITH and LIGHTNER,
128 *La Salle st., Chicago, Ill.:*

Herewith I send Messrs. J. Hodges & Co. check No. 307584 to 5th Nat'l Bank, of Chicago, for $200.00, which I have assigned to you to pay for 5,000 bushels wheat for March, and 5,000 bushels do. for April. I suppose that for March you purchased at 90½, and April 91⅝, is that so? that was the price named in the 1st telegram; in the last telegram higher rates were named. I expect to get a letter from you by the mail which will correctly inform me,

What is the ruling price for mess pork? It fluctuates very much. If it should reach $10.25 I think that I would sell one or two thousand barrels. But give me freely your opinion as to the prospect for March and April for mess pork. Hogs keep up and if the receipts should fall below 20,000 per day, wouldn't pork go up? Keep me informed if changes occur in prices and prospects ahead, also as to lard and wheat. I fear that lard
30 was a bad purchase.

Truly, yours, JOHN H. ROUNTREE.

The following telegram from defendant to plaintiffs read in evidence:

PLATTEVILLE, WIS., 14, 1879. (Received at Chicago, Feb'y 14th.)
To SMITH and LIGHTNER, 128 *La Salle st.*:

Telegram received. Purchase 5,000 bushels wheat March; same, April.

JOHN H. ROUNTREE.

Also telegram from plaintiffs to defendant, as follows:

CHICAGO, ILLS., 2, 14, 1879. (Received at Platteville same day.)
To JOHN H. ROUNTREE:

Bought 5,000 March wheat, 90; same, April, 92⅛; pork closed 9.87½.

SMITH & LIGHTNER.

Also letter from plaintiffs to defendant and read in evidence:

CHICAGO, *Feb'y* 14, 1879.

JOHN H. ROUNTREE, Esq., *Platteville, Wis.*:

DEAR SIR: For your ac't to-day we bought 5,000 M'ch wheat, at 91; 5,000 April, 92⅛; wheat firm to-day; March opened 90½, fell to 98⅜, advanced to 91, fell to 90½, and closed at 91; April, 92⅛. April pork opened this a. m. $9.95 to $10.00, but soon fell to 9.90, later to 9.75; advanced to 9.87½ and closed there, 9.87½. To-day being Friday, the last of the week, trade was not very large. May corn was the principal deal to-day. Very large purchases made; 560,000 bushels changed hands on call board, 37 to 37⅛. Provisions not very active to-day, but on the whole prices well maintained. ℅ enclosed.

SMITH AND LIGHTNER.

Plaintiffs wrote defendant the following letter:

CHICAGO, *Feb'y* 17, 1879.

JOHN H. ROUNTREE, Esq., *Platteville, Wis.*:

DEAR SIR: Your favor of the 15th at hand and noted. Wheat market very strong to-day. April sold up to 93⅞ and closed 93⅛; March, 92¼.
Your purchases were 91c. p'r M'ch; 92⅛ for April. Wheat market
31 looks strong to us. Provisions to-day very little doing. Stock of
provisions published to-day stengthened prices a little. Stock of pork here 194,000 bbls.; 189,000 tcs lard. Pork is nearly 100,000 less than last year; ought to cause better prices, but there is no telling. April pork sold early 9.90, declined to 9.72½, and closed 9.77½. Lard, 6.75.

One firm here hold nearly all the lard and are not selling any. Hardly know what to think of w't deal now. ℀ enclosed.

Yours, truly,

SMITH & LIGHTNER.

Plaintiffs wrote defendant the following letter:

CHICAGO, *Feb'y* 18, 1879.

JOHN H. ROUNTREE, Esq., *Platteville, Wis.:*

DEAR SIR: Your favor of 15th and telegram to-day at hand. Telegraphed you the price of wh't and pork. We will buy any amount of wheat you desire on as small margins as you want to send, but would, in case the market should go against you, want you to keep it margined up to the markets. Wheat very strong to-day; April wheat closing 93⅜; M'ch, 92⅜; bid c. at; 92c. looks as if it was going to sell much higher. Provisions showed some activity to-day; April lard advanced from 6.65 to 6.87½, 17½ cts., and closed 6.80. April pork closed 9.85. ℀ enclosed.

Yours, truly,

SMITH & LIGHTNER.

The following telegram (night dispatch) from defendant to plaintiffs received and read in evidence:

PLATTEVILLE, WIS., 19, 1879. (Received at Chicago, Feb'y 19th.)

To SMITH and LIGHTNER, 128 *La Salle st.:*

Let me hear price mess pork to-morrow. Should it get to ten and more sell 1,000 barrels.

JOHN H. ROUNTREE.

Also the following telegram received in evidence:

PLATTEVILLE, WIS., *Feb'y* 19, 1879.

To SMITH and LIGHTNER, 128 *La Salle st.:*

How much net money could you get for the first thousand barrels pork purchased for me?

32 JOHN H. ROUNTREE.

Defendant sent plaintiffs the following letter:

PLATTEVILLE, WIS., 2, 19*th*, 1879.

Messrs. SMITH and LIGHTNER,
128 *La Salle st., Chicago, Ills:*

As it is now near mail-time, 12 m., I hope to hear from you by letter. Is there a good appearance of pork going up? If so, about how much? Do you think wheat will go still higher? What do you advise about purchasing 10 Mar., 20 M, of No. 2 spring wheat for April? What do you think of corn for March or April? What is to pay on 10 M bushels of corn down, and so forth? I am very much obliged for the telegrams and price-currents. Keep me informed. Is it 5c. a barrel for buying and selling pork that you charge, or what? What for wheat, corn, &c.? Write me fully.

Yours, truly,

JOHN H. ROUNTREE.

Plaintiffs wrote defendant the following letter:

CHICAGO, *Feb'y* 19, 1879.

JOHN H. ROUNTREE, Esq., *Platteville:*

DEAR SIR: Glad to inform you of the rise in pork and wheat to-day. Now think we will get a good advance. If pork advances much more, think we had better sell 1,000 barrels, say at $10.25. April pork opened at 9.92½, sold up to 10.15, and closed 10.12½. April wheat sold up to 95, and closed 94¾; think wheat will go to 1.00. %c enclosed.

Yours, truly,

SMITH AND LIGHTNER.

Defendant wrote plaintiffs the following letter:

PLATTEVILLE, WIS., *Feb'y 19th,* 1879.

Messrs. SMITH and LIGHTNER:

I have just now received your telegram of this forenoon, and I ask you to pardon me for asking an explanation: You say "ninety-three dollars, at eighty-five." Is that $93 profit on the 1,000 bbls. first purchase
33 of pork, after your charges are taken out, and the $500 that I sent to you besides, or is it $93 profit on that deal? Please to write and fully explain, and truly oblige your sincere friend,

JOHN H. ROUNTREE.

The following telegram from defendant to plaintiffs read in evidence:

PLATTEVILLE, WIS., *Feb'y* 20, 1879.

To SMITH and LIGHTNER, 128 *La Salle st.:*

Purchase thirty thousand bushels of corn, April or May; five thousand wheat, April; or ten thousand, if you think best.

JOHN H. ROUNTREE.

Also the following telegram, from plaintiffs to defendant, was read in evidence:

CHICAGO, ILLS., 2, 20, 1879. (Received at Platteville same day.)

To JOHN H. ROUNTREE:

Sold 750 April pork, 10.12½; 250, $10. Market not strong.

SMITH & LIGHTNER.

Also the following telegram from plaintiffs to defendant:

CHIGAGO, ILLS., 2, 20, '79. (Received at Platteville same day.)

To JOHN H. ROUNTREE:

Bought 25,000 May corn, 7¼; 5,000 May wheat, 90¾. Pork closed at 10.00.

Q. What is this 25,000 May corn?
A. 25,000 bushels of May corn, at 37¼.
Q. And 5 April wheat, at 90¾ of a cent?
A. 5,000 bushels.

Plaintiffs sent defendant the following letter:

CHICAGO, *Feb'y* 20, 1879.

JOHN H. ROUNTREE, Esq., *Platteville:*

DEAR SIR: Received your dispatch this a. m., after first call, to sell 1 M Ap'l pork; sold it on regular board the best we could; 750, 10.12½; 250, 10.10. Enclosed please find statement P and S, 1,000 bbl. April pork. Gain to your credit, $250. We bought for you to-day 25
34 M May corn, 37⅜; 5 M, 37¼; 5 M April wheat, 83¼. Wheat
market broke 2½c. to-day. April sold at 95½, and closed 93c. Pork sold for 10.22½ to 9.97½, & closed 10.02½. Coms. on pork, 5c bbl.; wheat, ¼ per bu., $12.50. ℅ enclosed.

Yours, truly,

SMITH AND LIGHTNER.

P. S.—Your favors of 19th at hand and noted. Think well of wh't and pork.

S. AND L.

The following telegram from defendant to plaintiffs was read in evidence:

PLATTEVILLE, WIS., *Febr'y* 21, 1879.

To SMITH and LIGHTNER, 128 *La Salle st.:*

Sell 500 barrels pork not less than ten dollars thirty cents, if you can.

JOHN H. ROUNTREE.

Defendant sent to plaintiff the following letter:

PLATTEVILLE, WIS., *Febr'y* 21, 1879.

Messrs. SMITH and LIGHTNER,
128 *La Salle st., Chicago, Ill.:*

GENTLEMEN: Your letter of the 19th inst. came duly to hand yesterday, also your telegrams of yesterday saying that you had purchased 30 M. bushels May corn at 37⅜ and 37¼; also 5,000 bu. of wh't, but I could not learn from the telegram exactly what you paid for the April wh't. I expect to get your letter informing me when the mail arrives, within an hour from this time. I had thought of purchasing a lot of oats for April or May, also a little more wheat and corn. What do you advise? What do you think of pork? What price do you think it will command between this time and April? I now think of going to Chicago on Monday, 24th inst., and shall probably stop a day or two. If there is any occasion to send me a telegram before Sunday, do so. I hope to see you Monday, soon after the arrival of the train, which should be 3.50 p. m., as I will go to your office on arriving at Chicago.

35 Truly yours,

JOHN H. ROUNTREE.

Defendant sent plaintiffs the following letter:

PLATTEVILLE, WIS., *Feb'y 21st*, 1879.

MESS. SMITH and LIGHTNER,
128 *La Salle st., Chicago, Ill.:*

Your favor of yesterday, containing statement of purchase and sale of 1,000 bbl. pork. You will please to look over the statement on your books. You will find an error on the 750 bbls. at 40 cts. profit. Your statement is $200; I think it should be $300. Other is right, making gain of $350, instead of $250.00. I hope to see you Monday afternoon, 24th inst., when we will look over it.

Truly yours,
JOHN H. ROUNTREE.

The following telegram from plaintiffs to defendant was read in evidence:

CHICAGO, ILL'S, 3, 1, 1879. (Received at Platteville same day.)
To JOHN H. ROUNTREE:

Sold 20 April wheat, 95 and 95⅜. Bought 1,000 pork, 10.25. Close sellers, 5.

SMITH & LIGHTNER.

Also the following night despatch from defendant to plaintiffs read in evidence:

PLATTEVILLE, WIS., 3, 1879. (Received at Chicago 3, 3.)
To SMITH & LIGHTNER, 128 *La Salle st.:*

If you can purchase two thousand pork at less than ten, do so for me.
JOHN H. ROUNTREE.

Also the following telegram from plaintiffs to defendant was read in evidence:

CHICAGO, ILL'S, 3, 4, 1879. (Received at Platteville same day.)
To JOHN H. ROUNTREE:

Bought 750 April pork, 9.92½; 1,250, at 95.
SMITH & LIGHTNER.

Also the following telegrams from defendant to plaintiffs were read in evidence:

PLATTEVILLE, WIS., *March* 4, 1879.
To SMITH and LIGHTNER, 128 *La Salle st.:*

36 Purchase 20,000 May oats, six one-quarter. Telegraph.
JOHN H. ROUNTREE.

PLATTEVILLE, WIS., *March* 4, 1879.
To SMITH and LIGHTNER,
128 *La Salle st.:*

Purchase 20,000 oats six May, and ten thousand wheat four half.
JOHN H. ROUNTREE.

Plaintiffs sent defendant the following letter:

CHICAGO, *March* 4, 1879.

JOHN H. ROUNTREE, Esq., *Platteville, Wis.:*

DEAR SIR: On your night message received this a. m. we made following purchases:

Bought 750 bbls. April pork, at 9.92½.
" 1,250 " " " " 9.95.

And so wired you, quoting at the same time wheat, oats, and corn. We quoted May oats at 26c.; they did not touch that point, however, all day. A few sales were made at 26¼, and closed this evening 26⅜ bid. The market was not open when the writer telegraphed this morning, but supposed it would weaken along with everything else, but in that we missed the mark. Have your order to purchase 20 M May oats at 26¼ and 20 M at 26. Will execute the same if the market will allow, unless we hear from you to the contrary, & also to purchase 10 M April wheat at 94½. Everything closing up strong at outside prices this evening—April wheat, 95¼; pork, 10.05; lard, 6.62½; oats, 26⅜; corn, 37¼. Armour and Co. have been making a desperate effort to break down the provision market the past few days and have succeeded very well. They succeeded in shaking out a great many small operators, and to-day we think they undertook to cover some of their short pork, and that is the cause of the present advance. Presume we will see you down this way again within a very few days. Find our %c enclosed.

Yours truly,

SMITH & LIGHTNER.

37 The following telegram from defendant to plaintiffs was received in evidence:

PLATTEVILLE, WIS., *March* 16, 1879.

TO SMITH AND LIGHTNER,
128 *La Salle st.:*

Purchase 5,000 wheat and 10,000 oats for me.

JOHN H. ROUNTREE.

Plaintiffs sent defendant the following letter:

CHICAGO, *March 6th*, 1879.

JOHN H. ROUNTREE, *Platteville:*

DEAR SIR: Your messages of this date at hand. Sent you markets. Received order per wire to purchase 5 M wheat and 10 M May oats. Bought 5 M April wh't at 96⅛; 5 M May oats, 26⅜, and 5 M 26½. All markets generally closing up a little weaker this evening. Provisions much weaker and lower, April pork closing 9.80; lard, 6.47½; May pork, 9.90; April wheat, 96¼; May corn, 37½; May oats, 26⅝. We look for still lower prices to-morrow on provisions. Will wire you this evening to remit $3,000 additional margins on trades. You stand to 250 bbls. pork and 1,000 tcs. lard, besides corn, wheat, and oats. However, it is only on provisions that we want the margins. Find %c enclosed.

Yours, truly,

SMITH & LIGHTNER.

The following letter sent by defendant and received by plaintiffs was read in evidence:

CHICAGO, *March 22d*, 1879.

Messrs. SMITH & LIGHTNER:

GENTLEMEN: As I leave this morning for home and shall not be able to see you to-day or for a few days, I want to ask you to sell my lard when you shall be able to get what you think is the best price for it, also my wheat. Don't keep or hold too long, but do the very best that you can for me. Keep me informed by letter to Platteville, and if you shall think it necessary telegraph me. The lard and wheat are April.

Yours, truly,

JOHN H. ROUNTREE.

Defendant sent plaintiffs the following letter:

38 PLATTEVILLE, *March 24th*, 1879.

Messrs. SMITH and LIGHTNER,
128 *La Salle st., Chicago:*

GENTLEMEN: Your telegram came at noon to-day, informing me of prices of produce, and I declare I do not know what to do, for it seems that everything goes against me. Had the corn and oats better be sold—also the wheat? I do think that May pork will reach a much better figure before 10th April; also June pork. I do think the pork is all worth more than it cost me. But if you advise the selling of the corn, oats, and wheat, do so, notwithstanding my great loss on them. You say, corn, 35¾; May oats, 25⅛; April wheat, 9¼. At these prices my loss will be very great. But perhaps you had better sell the corn, oats, and wheat. If it shall look and appear that any of these articles will very soon do better, you will use your judgment about holding a little while. I rely upon you and your judgment, though none of us know what is coming. If you think best, sell the grain.

Yours, truly,

JOHN H. ROUNTREE.

Have you sold the lard? If so, I hope you got a good price for it.

R.

The following telegram was sent by defendant to plaintiffs, and received in evidence:

PLATTEVILLE, WIS., *M'ch* 26, 1879.

To SMITH & LIGHTNER, 128 *La Salle st.:*

It would be well to hold all awhile.

JOHN H. ROUNTREE.

Plaintiffs sent defendant the following letter:

CHICAGO, *March 27th*, 1879.

Hon. JOHN H. ROUNTREE, Esq., *Platteville, Wis.:*

DEAR SIR: We changed for your account to-day 500 Ap'l lard to May

lard; sold 500 Ap'l, 6.37½; bought 250 May, 6.45; 250 at 6.47½.
39 We enclose statement P. & S., 500 Ap'l lard loss to your dr., $885.

We will change the other 500 the best we can before 1st of April. Lard market has been dull and weak for some time, but expect it will come around all right again. Pork firm to-day, considering receipts of hogs, 20,000; May opened 10.20; advanced to 10.30; closed 10.22½. If pork advances much think you had better sell, and hold the corn and oats. May corn to-day 36 and 36¼; closed 36 bid. Oats, 25¼ bid. Ap'l wh't, 89c.; closed 88⅞. % enclosed.

Yours, truly,

SMITH AND LIGHTNER.

Defendant sent plaintiffs the following letter:

PLATTEVILLE, WIS., *M'ch 27th*, 1879.

MESSRS. SMITH & LIGHTNER,
182 *La Salle st., Chicago:*

Your letter of yesterday came to-day, and I fully agree with you that if you get a satisfactory advance at any time on corn, wheat, oats, or lard you had better sell, especially the April wheat and lard. What can you do with them? Wasn't I most fortunate in buying at the time that I did? I suppose that you will have to close them (lard and wheat) out at any rate (Ap'l purchase). I trust all to you. Do for me the best that you can.

Yours, truly,

JOHN H. ROUNTREE.

The following night telegram was sent by defendant and received by plaintiffs, and read in evidence:

PLATTEVILLE, WIS., *March* 27, 1879.

To SMITH and LIGHTNER, 128 *La Salle st.:*

Your letter received. I depend on you for right time to sell anything.

JOHN H. ROUNTREE.

40 Plaintiffs wrote defendant the following letter:

CHICAGO, *March* 29, 1879.

JOHN H. ROUNTREE, Esq., *Platteville, Wis.:*

DEAR SIR: Your favors of 27th & 28th at hand and noted. Besides the 250 lard, at 6.97½, 500, 6.85, there are 200 tcs. bought March 1st @ 6.80, which we think you will find in your little book. We notified you of the purchase March 1st, as you will find in our letter of that date. We did nothing for you to-day. Will sell the remaining 500 Ap'l lard Monday, or change it to May. Markets look to us about bottom, but it may go lower. May lard opened to-day 6.40, advanced to 6.45, closed 6.42½ & 645 bid. Pork strong. May opened 10.20, sold to 10.27½, closed 10.25 and 10.27½ bid. Indications are that Hutch will run pork up. Wh't dull and inactive. April closed 88⅞ to 89. May oats, 25⅛; corn, 36. Markets dull and not much doing. Think after April 1st m'k'ts. will be more lively and better. % enclosed.

Yours, truly,

SMITH & LIGHTNER.

The following telegram sent by defendant to plaintiffs read in evidence:

PLATTEVILLE, WIS., 27 *M'ch*, 1879.

To SMITH and LIGHTNER, 128 *La Salle st.:*

Hold my stuff until the best price be got; telegragph.

JOHN H. ROUNTREE.

Defendant wrote plaintiffs the following letter:

PLATTEVILLE, WIS., *M'ch* 31, 1879.

Messrs. SMITH and LIGHTNER,
128 *La Salle st., Chicago, Ill.:*

GENTLEMEN: Your night dispatch Saturday night came duly to hand.
Do you think that May pork will go up to 10.50, or higher? What
41 do you think about June pork? What is the prospect for corn and
oats for May? You purchased for me only 3 lots 750 of lard, and
in the little book that was made for me and handed me along some time in
March the three lots are all that are named. I recollect my deep regret
on the purchase of the last of the 3 lots that I had purchased any, for
I felt a conviction that I should lose money on them. There was a mistake
in charging on your books to me any more than the 750. What is the
outlook for the prices for coming month?

Yours, truly,

JOHN H. ROUNTREE.

Plaintiffs sent defendant the following letter:

CHICAGO, *Mc'h* 31*st*, 1879.

Hon. JOHN H. ROUNTREE, Esq., *Platteville, Wis.:*

DEAR SIR: For your account we changed the Ap'l wh't for May and Ap'l lard to May. We sold 5 M April wh't, 89c, and bought 5 M May, 94. Sold 500 Ap'l lard, 6.32½, and bought 250 May lard, 6.40, 250, 6.42½. We enclose statements P. and S. 5 M April wh't net loss, $362.50; 500 Ap'l lard, loss to dr., $825. Markets very quiet to-day. Pork firm; May 10.25 & 10.27½, closed 10.25. Lard steady; Ap'l 6.32½. Think everything will come around in time. If anything happens to change our opinion will notify you at once. ℀ enclosed.

Yours, truly,

SMITH AND LIGHTNER.

Defendant sent plaintiffs the following letter:

PLATTEVILLE, WIS., *April* 20, 1879.

Messrs. SMITH & LIGHTNER,
128 *La Salle st., Chicago, Ills.:*

Your favor of 31st last mo. came duly to hand. How does the
42 market look? Do you think there is a good prospect for lard to
advance during the present month so as to make May lard better
price? I do hope that May corn and oats may improve as well as pork.
Let me know if there is any improvement in prices and prospects in prices.
I rely upon you.

Truly, yours,

JOHN H. ROUNTREE.

Plaintiffs sent the following letter:

CHICAGO, *April* 3, 1879.

HON. JOHN H. ROUNTREE, *Platteville, Wis.:*

DEAR SIR: Your favor of the 2d at hand and noted. Telegraphed you yesterday May pork 10.50, also to-day, but received no answer. Thought perhaps we had better sell a little. Pork opened strong this a. m., 10.50½ May; 10.62½ June; lard, 6.50 May. Receipts, hogs 17,000. Markets weakened off, though, after opening, and May pork sold at 10.37½ and closed 10.40. Have faith in the pork, but think it a good plan to sell on the bulges and buy back on the breaks, as it breaks nearly every time after a rapid advance. Wheat firm to-day; May sold at 96½; oats, 25⅞; corn, 36½. ℀ enclosed.

Yours, truly,

SMITH AND LIGHTNER,

Defendant sent plaintiffs the following letter:

PLATTEVILLE, WIS., *Ap'l* 4, 1879.

Messrs. SMITH & LIGHTNER, 118 *La Salle st.:*

Your telegrams informing me of the spring in the price of wheat, pork, &c., &c., which occurred on early part of yesterday, was received; and as
you did not say it was best to sell some part, I did not reply. In
43 future, when you think it best to sell, say so, and say how much,
if you please. At this distance from the market, I am dependent
on you for information. I hope to see you in a few days. In the mean time please to keep me informed by telegraph, if necessary; also by letters.

Yours, truly,

JOHN H. RUONTREE.

Plaintiffs sent defendant the following letter:

CHICAGO, *April 12th*, 1879.

HON. JOHN H. ROUNTREE, *Platteville, Wis.:*

DEAR SIR: Our markets firmer all around to-day. May pork quiet at 10.32½ to 10.35. Closing 10.32½ firm. Hogs, 7,000; light receipts. Pork now looks a good deal better, but if we get a good advance had better sell and buy back on the decline. May lard higher, 6.20; May corn higher, 35½; wheat, also. May wheat sold up to 92c; closed 91½. Think time will bring everything around all right. ℀ enclosed.

Yours, truly,

SMITH AND LIGHTNER.

Plaintiffs sent defendant following letter:

CHICAGO, *April 14th*, 1879.

HON. JOHN H. ROUNTREE, *Platteville, Wis.:*

DEAR SIR: Markets weaker to-day. May wheat opened 92c.; closed 90c. sellers. No one making any attempt to stop the decline. Pork lower to-day. May pork closed 10.17½; June, 10.27½; hogs, 15,000. May lard very weak, 6.05 bid at close. If there is any advance in pro-

44 vision market to-morrow we will sell some pork and lard for you.
Think it might be a good thing to sell some lard short, as it continues to drop every day.

Yours, truly,

SMITH & LIGHTNER.

Plaintiffs wrote defendant the following letter :

CHICAGO, *April* 15th, 1879.

Hon. JOHN H. ROUNTREE, *Platteville, Wis.:*

DEAR SIR: Provisions weaker, almost panicky this morning. Everything looked so weak that we sold 1,750 bbls. June for your account: 250, 10.02½ ; 250, 10.10 ; 250, 10.05; average, 750, 10.07½ ; 750 at 10.02½ ; 250 @ 10.05. There was hardly any market for May pork at the time or would have sold May. We also sold 1,000 t'cs May lard, 5.92½. About 90,000 bbls. pork changed hands during excitement of morning board. June pork opened at 10.25, dropped to 9.97½ ; closed 10.12½ bid. At one time market looked as if it was going all to pieces, but rallied, and closed firm ; wheat weak, May closed 88½ ; May corn, 34⅜. Think corn, and wheat may rally before long. You now have 2,250 bbls. May pork. We enclose statements p. & *s.*: 1,750 bbls. June pork, loss, $730.50 ; 1,000 t'cs lard, loss, $1,740 . ℅ enclosed.

Yours, truly,

SMITH & LIGHTNER.

The defendant wrote plaintiffs following letter :

PLATTEVILLE, WIS., *April 15th,* 1879.

Messrs. SMITH & LIGHTNER,
Chicago, Ill., 128 *La Salle st.:*

I did hope that you had sold my lard, and sold short, as you had said ;
also wheat, and part at least of the corn. Do the best that you
45 can, for I have no more money to put into it, which I told you before.
I can't raise any more. I expect that all I put in, which
was over $3,000.00 is gone. If you can save anything, do so so for me.
Do the best that you can and keep me informed.

Yours, truly,

JOHN H. ROUNTREE.

Plaintiffs sent defendant the following letter :

CHICAGO, *April* 16, 1879.

J. H. ROUNTREE, Esq., *Platteville, Wis.:*

DEAR SIR: Did nothing for you yesterday. We hardly know what to think of the market at present. If May pork advances a little will close out what remaining pork you have, and stand on the balance wheat, corn, and oats, for we consider that they are about at the bottom. We are sorry that everything has gone so very largely against you, but of course we could not ward it off. We thought that we were doing the best when we sold the pork and lard yesterday. Lard went 7½c. lower after we sold, but to-day they have all been quite steady, and we hope for better prices on provisions to-morrow. Find ℅ enclosed.

Yours, truly,

SMITH AND LIGHTNER.

The following telegram from plaintiffs to defendant was read in evidence:

CHICAGO, ILLS., 4, 17, 1879.
(Received at Platteville same day.)

To JOHN H. ROUNTREE:

May wheat, 9.50; pork, 10.00; corn, 4¾; what shall we do with balance of your stuff? Your letter on hand this morning.

SMITH AND LIGHTNER.

46 Also the following telegram from defendant to plaintiffs:

PLATTEVILLE, WIS., *April 7th*, 1879.
(Received at Chicago, April 17th.)

To SMITH & LIGHTNER, 128 *La Salle st.:*

Do the best that you can with the stuff; either hold or sell as you think best; prices are ruinous now.

JOHN H. ROUNTREE.

Plaintiffs' sent defendant the following letter:

CHICAGO, *April* 7th, 1879.

J. H. ROUNTREE, Esq., *Platteville, Wis.:*

DEAR SIR: Your favor of the 15th at hand, and noted. We wired you this morning for instructions as to what we should do with the balance of your stuff. Up to the present time have not received an answer. We were surprised at the contents or rather wording of your letter, and so we took the same over to your son John M. to know what you meant by it. He said he knew you did not mean what you wrote literally, and he knew we would not lose any money by you. We have simply carried out your instructions, which were that we should use our judgment in the matter, and in doing so we sold the May lard and June pork, and now hold the May pork, oats, corn, and wheat, in all of which you have a loss. It is the writer's impression that were they all closed out at the market to-day there would be a loss of about $2,000.00. If May pork goes to 10.05 or thereabouts, we will close it out. It is the writer's opinion that the loss could be made up by selling July pork but of course we do not care to sell anything without margins as long as the present deals stand as they do. We are not anxious that the present difference should be paid
47 at once, but are willing to wait a short time. But of course should
like to have it settled as soon as possible, as we can always make use of the money in our business. We think you will sacrifice your corn by selling it at these prices, and would advise you to hold it a while longer. Trust we may hear from you in the morning.

Yours, truly,

SMITH & LIGHTNER.

The following telegram from defendant to plaintiffs was read in evidence:

PLATTEVILLE, WIS., *April* 18, 1879.

To SMITH & LIGHTNER, 128 *La Salle st.:*

Don't you think prices will better next week? Do as think best.

JOHN H. ROUNTREE.

The following telegram from plaintiffs to defendant was read in evidence:

CHICAGO, ILLS., 4, 23, 1879.
(Received at Platteville same day.)

To JOHN H. ROUNTREE:

We sold 750 May pork, 9.30; 200 at 9.27½; 250 May oats, 3½.

SMITH AND LIGHTNER.

Plaintiffs wrote defendant the following letter:

CHICAGO, *April* 18th, 1879.

J. H. ROUNTREE, Esq., *Platteville, Wis.:*

DEAR SIR: We sold for your account to-day 500 May pork, @ 9.77½, and 250 at 9.80. We also sold as a hedge against some of your pork 250 tierces July lard, at 5.97½. Enclosed please find statement p. & s.:
750 bbls. May pork; loss to debit, $437.50. Markets are closing
48 weak and lower this p. m. Should not be surprised to see them
still lower to-morrow morning. Have your message at hand asking about prices. Will do the best we can for you in the morning. Find our ℀ enclosed. Would be obliged to you if you could make a raise in some way, and remit us something on ℀, as we need it in our business. Find our ℀ enclosed.

Yours, truly,

SMITH AND LIGHTNER.

Defendant sent plaintiffs the following letter:

PLATTEVILLE, WIS., *April* 23d, 1879.

Messrs. SMITH and LIGHTNER,
128 *La Salle st., Chicago, Ills.:*

Prices have ruled low for the past week or more. I do hope they will advance somewhat, at least very soon. What is the outlook for the future? All that I can say now is, do the very best that you can with all of the stuff. I have confidence that you will look carefully to it and do the very best you can. I have no more money.

Truly, yours,

JOHN H. ROUNTREE.

Defendant wrote plaintiffs the following letter:

PLATTEVILLE, WIS., *April* 23d, 1879.

Messrs. SMITH and LIGHTNER,
#128 *La Salle st., Chicago, Ills.:*

GENTLEMEN: I am just in receipt of your letters of 21st and 22d inst., and contents noted. And I say in answer, as I have said to you verbally and by letter, that I have no more money to invest in the deals.

Yours, truly,

JOHN H. ROUNTREE.

49 Plaintiffs wrote defendant the following letter:

CHICAGO, *April 21st*, 1879.

J. H. ROUNTREE, Esq., *Platteville*, *Wis.:*

DEAR SIR: Nothing from you at a recent date. Markets all gone to pieces again this p. m. They opened up very strong, and remained that way all morning till just at the close, when they began to break, and have been breaking ever since. We still hold all of your stuff, and we have now carried it down as far as we think it right that we should, all things considered. Must ask you to try and make a loan so as to meet our difference in the stuff. Of course we can understand that at present you may not have any ready money. A great many people are always in that fix, but you have property upon which you can very easily make a loan if you desire to do so. We sincerely hope that you will meet our difference as soon as possible, and remit us the same at once.

Yours, truly,

SMITH AND LIGHTNER.

Plaintiffs sent defendant the following letter:

CHICAGO, *April 19th*, 1879.

J. H. ROUNTREE, Esq., *Platteville*, *Wis.:*

DEAR SIR: Markets are a little better to-day; June pork opened weak at 9.65 & 9.62½, advanced to 9.85 a. m., and closed 9.80. May opened 9.55, advanced to 9.75, and closed 9.70. Wheat closing firmer; May opened 86¾ and closed 87¾. Things have been awfully sick for past few days,
and so didn't seem unlikely that we would have a panic to-day,
50 but instead markets improved after the opening. May corn holds
up pretty well, considering the decline in everything else. May
corn closing to-night 34½ bid. If things are better Monday will buy in the 250 lard short. ℀ enclosed.

Yours, truly,

SMITH & LIGHTNER.

Plaintiffs wrote defendant the following letter:

CHICAGO, *April 22*, 1879.

J. H. ROUNTREE, Esq., *Platteville*, *Wis.:*

DEAR SIR: Sold for your ℀ to-day 500 May pork at 9.25; market closing at that figure this evening. Enclosed please find statement of p. & s.: 500 bbls. May pork; loss to deb't, $500.00. We did not sell anything else, as we thought things might rally, but they do not seem to rally any.

In the morning, unless we have more encouraging markets, will close out the 20th May oats and the balance of the pork. Do not feel strong at all on oats, but think we will get better prices on corn and wheat before many days have gone by, and will hold them a while longer, unless we get positive orders from you. Wish you would attend to the matter at once about which we wrote you last evening. We have now paid out cash on all the trades we have settled for your acc't, and on the balance still open we have put at excessive margins, so that it is imperative that you make good your account to us at once. It is simply as a matter of justice that we now

ask you to make it good at once. The ℀ is so far beyond what you or
we expected it would be that we feel that it must be made good in order
that we can continue our business successfully. It will be an easy
51 matter for you to make a loan on some of your property and secure
us, and the time may come soon when we can regain it all again.
Find our ℀ enclosed.

Yours, truly,

SMITH & LIGHTNER.

Plaintiffs wrote defendant the following letter:

CHICAGO, *April 23d*, 1879.

Hon. JOHN H. ROUNTREE,
Platteville, Wis.:

DEAR SIR: No letters from you of late. Not seeing any prospect for an advance we sold out to-day for your ℀ 20 M May oats, 24⅜; 25 M May corn, 33½; 750 May pork, 9.30; 250, 9.27½. We enclose statement P. & S. 1,000 bbls. May pork, loss to your Dr., $968.75; 25 M May corn, loss $1,031.25; 20 M May oats, loss $431.25. Markets opened very sick and discouraging this morning; May pork, 9.15; June, 9.27½. We determined that if there was an advance during the day we had better sell some pork, corn, and oats, and did so. We have carried everything for you, hoping that we would have an advance, and that you could get out without a loss, but instead markets have continued to decline, and we have done what we thought was best for your interests. You still have 25 M May corn, and 5 M May wheat, 250 July lard, short. Your ℀ is now out $3,475.00, which we trust you will soon make good to us, as we paid it out for you. Hoping soon to hear from you,

Yours, truly,

SMITH AND LIGHTNER.

Plaintiffs wrote defendant the following letter:

CHICAGO, *April 24th*, 1879.

52 Hon. JOHN H. ROUNTREE, *Plattsville, Wis.*:

DEAR SIR: Your favor of 23d at hand and noted. We do not think you appreciate the situation or you would not have written as you did. We have been carrying a number of trades against you though the market was against you and your margin run out, hoping a reaction would come and help you out; but as none came and markets went more against you than ever, we sold out some of the property as we deemed it best. We have now paid out considerable money on your trades above what you had with us, as you can see by your statements, and now look to you to make it good to us. We cannot afford to carry trades for our customers without margins, and would not have done so in your case except that we thought you were good for anything that you did and that we could rely on you in case that you lost anything. We still think so and hope that you will make your account good as soon as you can. ℀ enclosed.

Yours, truly,

SMITH AND LIGHTNER.

Plaintiffs sent defendant the following letter:

CHICAGO, *April 5th*, 1879.

J. H. ROUNTREE, Esq, *Platteville, Wis.:*

DEAR SIR: Your favor of the 23d at hand and noted. We to-day sold out the balance of your May corn. Enclosed please find statement, P. & S., 25 M May corn, net loss to your debit $1,068.75. You now stand short the 250 tierces July lard and long the 5 M May wheat. We cannot understand the position you take with reference to your deals.
53 You told Mr. Lightner that whatever S. & L. did would be satisfactory,
and that in case of any additional losses you would make them good, and acting on that supposition we did the best we could. When we first received your letter about your not having any money, Mr. L. called on your son in this city and stated and read your letter to him. He at once said you certainly did not mean to go back on your contracts, and that was not the meaning you wished to convey.

We cannot imagine that you mean to be guilty of a dishonorable act, and such it would be if you forced us to go into the courts to collect our claim, and by reference to the records you will find that we can collect our claim through the courts. We trust that we shall never be forced to any such procedure. We of course are not responsible for the course the market may take, and sincerely regret the loss, but such is the way in trading. We have plenty of traders that are now out on this market much more than what you are, and they do not hesitate to pay up, and one had to raise the money in the same way we wish you to do in order to make your ℀ good. We wish you to attend to this matter at once, as we wish some remittance on ℀ before the 1st of May. It is a matter of honor and we trust you will attend to it at once, as we are now out that amount of money.

Yours, truly,

SMITH AND LIGHTNER.

Plaintiff wrote defendant the following letter:

CHICAGO, *April 26th*, 1879.

Hon. JOHN H. ROUNTREE, *Platteville, Wis.:*

54 DEAR SIR: We enclose herewith statement of ℀ to date, showing balance to your d'r $4,543.75. There is a d'r of $531.25 for 1,000 pork, ℀ H. S. Rountree in addition, for which you agreed to be responsible. We have still 5 M bushels of wheat that we were holding for you, and the 250 t'c's of lard that we sold as hedge against your trades. We have written several times of late stating how your ℀ stood, and trust that you will take immediate steps to make it good. Wheat firm today. May closed 89⅝, three cents higher than a week ago to-day. Lard closed 6.12½ for July. ℀ enclosed.

Yours, truly,

SMITH & LIGHTNER.

Plaintiffs sent defendant the following letter:

CHICAGO, *April 29th*, 1879.

Hon. JOHN H. ROUNTREE,
Platteville, Wis.:

DEAR SIR: No letter from you yesterday. We closed out the remaining trades on our books for your account to-day, so that there is nothing more open. We bought 250 t'c's July lard, 6.10, and sold 5 M June wheat, 91⅜, against 5 M bought at 92⅝ yesterday. The loss on wheat is more than gained by the lard. July lard yesterday sold at 6.27½, and if we had bought it then the loss would have been $140 more. We enclose statement P. & S. 5 M June wheat, loss to your d'r 62.50; 250 t'c's lard, loss $125.00. We also enclose statement of ℀ to date, which shows balance to your d'r $5,412.50. This represents the money you now owe us, everything closed out. We have already written you two or three
55 times to make your acc't good to us, and wish you would give it your immediate attention, as we need the money.

Yours, truly,

SMITH & LIGHTNER.

Plaintiffs sent defendant the following letter:

CHICAGO, *April* 30, 1879.

J. H. ROUNTREE, Esq., *Platteville, Wis.:*

DEAR SIR: No letter from you of a recent date. We are somewhat surprised that you should delay so long in answering our letters and moving in the matter of the settlement of the same. Must ask that you attend to this matter at once, as it might place us in an uncomfortable position. Do not forget that some justice is owing in the matter, and that you are retarding the same in not making a settlement of the claim. We earnestly hope that you will make the settlement at an early date. Find ℀ enclosed. Markets closing steady and quiet.

Yours, truly,

SMITH & LIGHTNER.

Plaintiffs wrote defendant the following letter:

CHICAGO, *May 3rd*, 1879.

J. H. ROUNTREE, Esq., *Platteville, Wis.:*

DEAR SIR: No communication from you of a recent date. Have been expecting one all this week. It is asking too much of us to put us off in this way. It is positively necessary that you should make good part of your account to us at once. We have not presented the matter to J. M. Rountree, esq., for the simple reason that we did not wish to bother
56 him in any way about it, but we must mention it to him the coming week and present the case in its true light.

We relied upon your word and honor entirely in the matter, and still feel that we shall not be disappointed. $5,412.50 is a decidedly large amount to young men like ourselves, just starting in business. Markets are steady and quiet.

Truly, yours,

SMITH & LIGHTNER.

Plaintiffs wrote defendant the following letter:

CHICAGO, *May 7th*, 1879.

JOHN H. ROUNTREE, Esq., *Platteville, Wis.:*

DEAR SIR: We have been disappointed in not receiving any communication from you in reply to our letters calling upon you to make good to us the money we have paid out on your contracts in pork, wheat, &c. You asked us to do the best for you on your deals that we could, and we did so. To save you from further loss, as everything kept going lower, we sold out your deals the best that we could. We are not responsible for the markets; we could not keep them up. You had made your trades and will have to abide the consequences. We are very much surprised that you did not make your account good immediately upon receipt of our statement of your indebtedness, or, if unable to do so right away, to inform us that you were making arrangements to do so as quick as possible. If we do not hear from you very soon one of us will be obliged to visit Platteville, or send some one there to represent us, and find out what you intend to do, as we cannot afford to let this run.

57 Yours, truly,

SMITH & LIGHTNER.

Defendant wrote plaintiffs the following letter, which was read in evidence by defendant as part of his defense:

PLATTEVILLE, WIS., *May 8th*, 1879.

Messrs. SMITH & LIGHTNER, *Chicago, Ills.:*

GENTLEMEN: I have your letter dated yesterday. You say that you had paid out money on my contract, which you called on me to repay you. You wish to know what I am going to do. In reply, I say that if I felt that I owed you anything I would pay you at any cost or sacrifice. But I do not feel that you have any legal or moral claim on me for anything more than the money I placed in your hands, and which has been lost, as I understand from you. On March 11th last, I informed your Mr. Smith, in substance, that the money I had then advanced was all I had to risk, and all that I intended to risk in the deals or business; that I could and would invest no more than what I had already placed in your hands. That if any part of that could be saved I should be glad, but that in any event I intended to venture no more money—not one dollar. At that time, and for a long time afterwards, the amount of money that I had then paid you, as I then and now believe, covered all shrinkage in value of the options bought. You could then have sold the stuff bought and saved my loss beyond the amount you had of mine then. There can be no doubt that after I told you, as I did, that I would be responsible for no loss or shrinkage beyond the amount I had already paid 58 you, you chose to keep the stuff until a further loss was sustained. It was at your own risk. In view of my explicit verbal statements to your Mr. Smith that I did not intend to risk anything more than the amount you then had of mine in your hands, and that I could and would be responsible for no more, added to my written statements to you, several times repeated, that I had no more money to invest, your duty was, it seems to me, plain to close out the goods or stuff the very moment the moneys that I had placed in your hands were swallowed up by the shrinkage or decline in price. As I said above, notwithstanding my repeated verbal instructions, if you have chosen to pursue such a course as to incur loss beyond the amount of money I placed in your hands it is your loss, not mine. This seems to me so plain that I did not consider it necessary to state it. As you persist in claiming money of me which I do not owe you, I have written this in order that there may be no further occasion for correspondence on this subject.

Very respectfully, yours,

JOHN H. ROUNTREE.

Plaintiffs wrote defendant the following letter:

CHICAGO, *May 10th*, 1879.

JOHN H. ROUNTREE, Esq., *Platteville, Wis.:*

DEAR SIR: In reply to our many letters to you we finally received one from you, and are very much astonished at its contents. We never 59 understood anything else from you except that you were responsible for any orders you gave us, and that if any loss should occur over the margin we had, you would make it good to us. Mr. Lightner called upon you the day you left the city, and informed you that your loss at that time was $500.00 over the margin we had, and asked you for instructions as to your trades and advised closing them out. You told him to hold the property; that you expected to see higher prices, and for us not to sell. We did as requested, and held till there seemed no hope for a reaction. We should have sold everything out immediately if we had any idea that you were not financially well enough off to margin the trades or not honorable enough to make good any loss that might occur over the margin held. We carried your pork down once before when you had a much larger loss than you have this time, and markets finally changed and you got out all right. We never felt any anxiety, because we trusted in your honor to make good any loss, if there should have to be one, and knew that you were able to make the loss good. You surely couldn't have thought we would buy a quantity of property for you and carry it way down and run the risk of losing a large amount of money, and in case of a loss we would have to stand it, and in case of a profit give it to you. We closed out your trades the best we could, according to your instructions, and have tried to make it plain to you the amount of your indebtedness. We have also spoken to Mr. J. M. Rountree, and expect that he will write to you. We should like to settle with you amicably, if we can, but if you still persist in not acknowledging your liability there is only one 60 way left to us to protect ourselves, and that by the courts. You not only repudiate your own trades, but say nothing about the 1,000 bbls. of pork you guaranteed for H. S. Rountree on which there was quite a loss. You failed to write us you had no more money until a loss was already made, and we understood that to mean you had no ready money. Hoping it is now clear to you,

Yours, truly,

SMITH AND LIGHTNER.

The witness also produced and identified a number of telegrams received by plaintiffs' firm from defendant, and telegrams from plaintiffs' firm to defendant from about February 16th, 1879, down to April 23d, 1879. For part of that time telegrams passed between the parties almost daily.

From the plaintiffs to defendant they contained statements of purchases and sales, information as to the state of the markets and prospects for future markets in their opinion. From defendant to plaintiffs they contained inquiries as to markets, directions to buy or sell, or requests to plaintiffs to do for him what they thought best substantially as in his letters to them. The telegrams are omitted as containing nothing affecting the questions raised by defendant's exceptions.

Statements of a/c were also produced and identified by the witness as having been furnished to the defendant from time to time during the progress of the transactions between them, from which the following are taken as showing the mode in which the accounts were kept, and the business transacted. The remainder are omitted as unimportant.

61 102.] *Statement of purchase and sale of 500 bbls. pork, seller, April, account J. H. Rountree, esq., by Smith and Lightner.*

Bought.	Sold.	Dr.		Cr.
Feb. 6. 250, 9.75	M'ch 17. 250, 10.65	30		75 00
250, 9.75	250, 10.07½	32½		81 25
	Coms	5	25 00	
	Gain to cr		131 25	
			156 25	156 25

SMITH & LIGHTNER.
HESS.

E. & O. E. CHICAGO, *March* 17, 1879.

103.] *Statement of purchase & sale 3,500 bbls. pork, seller, April, account J. H. Rountree, esq., by Smith & Lightner.*

Bought.	Sold.	Dr.		Cr.
Feb. 27. 1,000, 10.25	M'ch 18. 1,000, 10.22½	2½	25 00	
" " 500, 10.22½	500, 10.22½			
	Coms	5	75	
	Loss to dr			100 00
			100 00	100 00

SMITH & LIGHTNER.
HESS.

E. & O. E. CHICAGO, *M'ch* 18, 1879.

104.] *Statement of purchase and sale of 3,500 bbls. pork, seller, April, account J. H. Rountree, esq., by Smith and Lightner.*

Bought.	Sald.	Dr.		Cr.
Feb. 7. 500, 9.80	M'ch 18. 500, 10.12½	32½		162 50
250, 9.77½	250, 10.10	32½		81 25
250, 9.80	250, 10.12½	32½		81 25
11. 500, 10.10	500, 10.12½	2½		12 50
500, 10.12½	500, 10.12½			
250, 10.07½	250, 10.07½			
62 500, 10.07½	500, 10.10	2½		12 50
250, 10.05	250, 10.10	5		12 50
26. 500, 10.35	500, 10.10	25	125 00	
	Coms	5	175 00	
	Gain to cr		62 50	
			362 50	362 50

SMITH & LIGHTNER.
HESS.

E. & O. E. CHICAGO, *Mar.*, 1879.

105.] *Statement of purchase and sale* 2,750 *bbls. pork, seller, April, account J. H. Rountree, esq., by Smith & Lightner.*

Bought.	Sold.	Dr.		Cr.
M'ch 1. 500, 10. 25	M'ch 20. 500, 10. 05	20	100 00	
250, 10. 25	250, 10. 12½	12½	31 25	
4. 500, 9. 95	500, 10. 10	15		75 90
500, 9. 95	500, 10. 17½	22½		112 50
500, 9. 92½	500, 10. 17½	25		125 00
250, 9. 92½	250, 10. 20	27½		68 75
250, 9. 95	250, 10. 20	25		62 50
	For changing coms	2½	68 75	
	Gain to c'r		243 75	
			443 75	443 75

SMITH & LIGHTNER.
HESS.

E. & O. E. CHICAGO, *M'ch* 20, 1879.

152.] *Statement of purchase & sale* 1,000 *tcs. lard, seller, May, account J. H. Rountree, esq., by Smith & Lightner.*

Bought.	Sold.	Dr.		Cr.
M'ch 27. 250, 6. 47½	Ap'l 15. 250, 5. 92½	55	440	
250, 6. 45	250, 5. 92½	52½	420	
31. 250, 6. 40	250, 5. 92½	47½	380	
" 250, 6. 42½	250, 5. 92½	50	400	
	Coms, pr. tc	10	100	
	Loss to dr			1, 740 00
			1, 740 00	1, 740 00

63

SMITH & LIGHTNER.
HESS.

E. & O. E. CHICAGO, *April* 15, 1879.

150.] *Statement of purchase and sale* 500 *tcs. lard, seller, April, account J. H. Rountree, esq., by Smith & Lightner.*

Bought.	Sold.	Dr.		Cr.
Feb. 28. 250, 6. 85	M'ch 31. 250, 6. 32½	52½	420 00	
M'ch 1. 250, 6. 80	250, 6. 32½	47½	380 00	
	Coms for changing	2½	25 00	
	Loss to d'r			825 00
			825 00	825 00

SMITH & LIGHTNER.
HESS.

E. & O. E. CHICAGO, , 187 .

159.] *Statement of purchase and sale of* 25,000 *bu. corn, seller, May, account J. H. Rountree, esq., by Smith & Lightner.*

Bought.	Sold.	Dr.		Cr.
Feb. 20. 5, 37½	Ap'l 24. 5, 33⅞	3⅝	181 25	
25. 20, 37⅜	" 25. 20, 33¼	4⅛	825 00	
	Coms	¼	62 50	
	Loss to d'r			1, 068 75
			1, 068 75	1, 068 75

SMITH & LIGHTNER.
HESS.

E. & O. E. CHICAGO, *April* 25, 1879.

149.] *J. H. Rountree in ℅ with Smith and Lightner.*

DEBIT.

	M'ch	18.	To loss 1,500 bbls. pork	$100 00	
		21.	" currency	300	
		27.	" loss t'c's lard	885	
		31.	" " 5,000 bu. wheat	362 50	
		"	" " 500 t'c's lard	825 00	
	Apr.	8.	" " 750 bbls. pork	37 50	
64	Ap'l	15.	To loss 1,750 bbls. pork	737 50	
	"	"	" " 1,000 t'c's lard	1,740 00	
		18.	" " 750 bbls. pork	437 50	
		22.	" " 500 bbls. pork	500 00	
		23.	" " 20,000 bu. 2 oats	431 25	
		"	" " 1,000 bbls. pork	968 75	
		"	" " 25,000 bu. 2 corn	1,031 25	
		25.	" " 25,000 " " "	1,068 75	
					$9,425 00

CREDIT.

Feb.	5.	By draft	500	
	8.	" "	1,500	
	11.	" "	200	
	14.	" "	750	
	17.	" "	200	
	20.	" gain 1,000 bbls. pork	250	
	24.	" error in statement of 19th	100	
	"	" gain 500 bbls. pork	375	
	25.	" " 5,000 bu. wheat	100	
M'ch	1.	" " 20,000 " "	293 75	
	17.	" " 1,000 bbls. pork	175	
	18.	" " 3,500 " "	62 50	
	17.	" " 500 " "	131 25	
	20.	" " 2,750 " "	243 75	
				4,881 25
		Balance to your debit		4,543 75

E. & O. E. CHICAGO, *April 26th*, 1879.

SMITH & LIGHTNER.
W.

148.] *J. H. Rountree, Esq., in ℅ with Smith & Lightner.*

DEBIT.

April	26.	To bal. per ℅ rendered	4,543 75
	28.	" loss on 5,000 bu. May wheat	150 00
	29.	" " " 5,000 " June "	62 50
	"	" " " 250 t'c's July lard	125 00

M'ch 31.	" " changing 1,000 bbls. pork (H. S. R.)	231 25	
Apr. 15.	" " " 1,000 " " (H. S. R.)	300 00	

CREDIT.

By balance		5,412 50
	$5,412 50	$5,412 50
To balance dr.	$5,412 50	

E. & O. E. CHICAGO, *April 29th*, 1879.

SMITH & LIGHTNER.
W.

65 Mr. Rountree came to Chicago about February 24th, and remained there several days. While there he went on the board of trade with me, and I made purchases for him while he was there on the board with me by his request or direction. I bought for him while he was there with me, on Febr'y 25th, 20,000 bushels May corn and 10,000 bushels April wheat; on Febr'y 26th, 500 bbls. pork; on Febr'y 27, 250 barrels pork and 250 tierces April lard; Febr'y 28th, 250 tierces April lard and 250 bbls. April pork; Febr'y 24, 500 barrels April pork; Febr'y 25th, 5,000 bushels March wheat. Some of these purchases were made while he was present and some from orders he left, that when the market touched certain figures I was to buy, and I did so. Sales were made in the same way, and we furnished him an account of sales of every sale we made.

About March 7th Rountree came to Chicago again and remained some time—I don't know how long. I think he was there quite a time. During the time he was there he was in our place of business all the while. Just before he arrived in Chicago, we telegraphed him to send $3000.00 additional margins. (This telegram was sent March 7th, and was replied to by H. H. Rountree, a son of defendant, to the effect that defendant was not at home, but was on his way to Chicago.) When defendant got to Chicago the markets had advanced and I did not call for them. I mentioned the fact that we had telegraphed for margins and it was not required now, for the market had advanced and we did not need the margin. During the time that he was there he went upon the board of trade with us, and we bought and sold for him there when he was present; the trades were called off in his presence. We bought for him while he was
66 there 10,000 bushels of oats on the 7th; 750 barrels of pork on the
18th; 1,000 barrels of May pork on the 20th, also 1,750 barrels of June pork; on the 21st, 250 barrels of May pork. On March 8th we sold for him 3,500 barrels pork; on March 17th, 500 barrels of pork; on March 18th, 1,500 barrels pork; on March 20th, 2,750 barrels pork. Most of this was done while he was present. Made none of those purchases and sales in his presence without his directions. The price current mentioned in the letters as enclosed was a review of the markets not only of Chicago but of other cities. It was published in Chicago and gave quotations, prices, sales, and all the transactions of the board of trade of that day, except as to quantities.

Our commissions were one quarter of a cent a bushel on grain, wheat, corn, &c.; 5 cts. a barrel on pork; 10 cts. a tierce on lard. That was the customary price, and so we informed defendant.

Some houses use contracts on the board of trade and some do not. The printed part of this paper represents a grain contract, such as is used on the board of trade. That is the form and kind of contracts used in all transactions, whether signed or not. If the party wants them filled up they are filled up, otherwise they are understood as written.

The contract identified by witness is as follows:

" *Lard contract.*

"CHICAGO, 3, 31, 1879.

"We have this day sold to Smith and Lightner 1,000 tierces prime steam lard, *at* 500 at 6.46, and 500 at 6.42½ per pound, to be delivered at seller's option during May, 1879. This contract is subject in all respects to the rules and regulations of the Chicago Board of Trade.

(Signed) "CHICAGO PACKING AND PROVISION CO.
"Per W. D. OLIVER."

67 When the market declined below the amounts of margins in our hands, we were required to put up additional margins, and keep them up until the contract is settled. We have to put them up within an hour. The debit against Mr. Rountree represents, in our final account against him, the money we have paid out for him on the contracts made for him and our commissions, and nothing else. We actually paid out that money on contracts that we made for Mr. Rountree, less our commissions. Our commissions amounted to $1,243.75, on all the trades. The remainder of the $5,412.50 was cash that we actually paid out. We made the contracts in good faith and lived up to them. Under the rules of the board if we had failed to make the payments we would have been suspended or expelled, or both, from the board of trade.

In some of our statements of account and letters to the defendant, we spoke of changing April for May pork. The object for exchanging is this: When the time of delivery of one month is up, if we had not changed it on the 1st day of April, we would have received this pork and have had to pay the cash for it and carried it till the next month, but by this we put the delivery off one month. This gave opportunity for the market to advance one month, and he would have got the benefit of it if it had advanced. In these contracts for April delivery, in case we had not sold the article which we purchased for April delivery before the last of April, the result would have been that we would have had to pay for them at the price at which we purchased them. These purchases of pork
68 and other articles mentioned in the correspondence and accounts represent the purchases of pork which would be delivered in April, some time during that month. They were actual purchases of the article specified in the contract in each instance. All these contracts were made in the name of the firm. All dealings on the board of trade are done in the name of the commission merchant, and he signs the contracts if we want it, and we sell to the commission merchant and sign the contract if he wants it, so that the dealing is all done in the name of the commission

merchant. That is the rule of the board. If we bought anything for any month, we expected it to be delivered, and there is no other understanding between commission merchants but whatever they buy is to be delivered. That was the case in reference to all the purchases we made for Mr. Rountree. We had no understanding or agreement between us and Mr. Rountree of any other character than that.

On cross-examination the witness said:

I have been a member of the board nearly two years. Am not certain what is the number of members of the board. There are over a thousand members. It takes one hundred to make a quorum. The majority of the members are brokers and commission men. Some members do not do any business. They can all transact business if they want to. The members of every elevator company are members of the board. Every transportation company has a man up there to look after grain. The members of every packing firm are members of the board. Armour & Co. and Hutchinson & Co. are members of the board, though they never do business in person; they trade through brokers. In the wheat
market there are generally about twenty-four men. I should think
69 there were that many brokers. In the corn market there are, may
be, fifty. Some of them are working for firms on salaries. In the provision market most of them work for packing firms. In that crowd there are sometimes—there are not more than four or five men there; sometimes as many as fifty, but they also do grain business. The brokers are in small numbers. There are at least three or four hundred members of the board acting as commission men or brokers; not that many firms, but that many acting with the board. In our office there are five members of the board who do business on the board. The "Hutch." referred to in one of our letters is Mr. B. P. Hutchinson, one of the largest pork packers in the West. Armour is the largest pork packer in the West. Never had any dealings with defendant before February, 1879. I think I had a conversation with defendant about what our commissions were to be. I think it was the morning that he first came to our house. I cannot say whether I spoke to him about commissions, but I did about margins. I think it almost impossible that I should not have spoken to him about commissions, but I cannot state the time. I have talked with Mr. Rountree about the usages and customs and forms of trade on the board, but I cannot state when. When we had bought April pork he spoke to us about it. He did not want to buck up for it in April, and wanted to know if we could not put off the delivery and he have the benefit of the advance, and we advised him to change it to May delivery, and we did; and I think we changed it afterwards to June, so as not to be obliged to take it in. The difference between cash and time purchases
on' change is that the price of wheat for the next month will be
70 higher than cash wheat, because it will take that much to carry it.

In one of our letters to Mr. Rountree I discussed the subject of how we could pay for property he might buy.

Question. Did you state, in this letter in answer to the letter of the 8th, "We will buy wheat for April delivery, 5,000 bushels, for $175.00 margin. When wheat is delivered in April we will pay for it ourselves and charge you 8 per cent. on the money (about $4,500), and our commissions are ¼, $12.50; insurance, $12.00; thirty days' storage 1c. pr. $75.00"?

Answer. It would not require any additional margins for carrying cash property, unless the market should go against us.

Question. Would not that be a cash purchase?

Answer. No, sir. I bought it for April and it was not yet April. In case he wanted to carry that wheat when April came we would take it in and pay for it. That is what it would cost him for carrying it for the month. It is not cash wheat at all; it is not delivered. It would not be cash wheat till I got it and paid for it.

Question. Was any such transaction ever made as is alluded to in that letter?

Answer. I cannot state whether we bought April wheat at that time or not, but I know that we did not take any wheat in on the first of April for him, but might have bought some then. I don't know whether he bought April wheat or not.

Question. In what respect was the transaction inquired about which you replied to in that letter different from the ordinary transactions you had with the defendant?

71 Answer. There is no difference at all. Simply if he intends to take the wheat in and pay for it when the time has come around and not change it, we must have sufficient notice so as to borrow the money.

Question. Do the cases where you take the property and pay for it bear the relation of one to one hundred to the cases where you do not?

Answer. They have a means of settling the trades same as between the clearing house and banks, which does away with a great deal of delivery, but if anything is bought for April, May, or any other month, any amount of it or all of it can be delivered.

By the COURT: The party has a right to insist upon an actual delivery?

Answer. Yes, sir; and you have to receive it if the parties that sold it want you to do so. If a party sells corn for the next month and the market is going higher, he will buy that corn and ship it to his broker, and when it all gets in there the broker will deliver that corn to the buyer. In the same way the shipper won't buy cash wheat, but will buy it for January delivery. He expects to get some means of transporting it, and he buys a thousand bushels of wheat and makes no other purchases for delivery in the month of January he gets it. On delivery day often 1,000 bushels of cash wheat will go round through a good many commission houses. You give me your check for $5,000, and the same $5,000 will go round town and settle up a great many contracts just the same as one bank bill will pay a great many debts. $5,000 of warehouse receipts may close out a great many debts.

Question. Do the settlements on the board of trade where grain or produce of any kind is actually paid for bear the proportion

72 to those that are not of one to one hundred?

Answer. Well, every month all the grain that is in the city is delivered in order to save the storage. It will all go around.

Question. Answer the question, yes or no.

Answer. I think there is probably more traded in there during the month than is delivered.

Question. Well, is there not one hundred times more traded there than is delivered in the month?

Answer. I could not say that.

Question. Can you say that there is not?

Answer. It is or is not just according as brokers wish. If they wait for the grain they will get it.

Question. Now, is there not one hundred times more grain bought and sold than is actually delivered?

Answer. I could not testify to that.

Question. Is there not a thousand times more?

Answer. It is very difficult to tell that. A great deal of wheat goes over for future delivery.

Question. Is it not the duty of the secretary of the board of trade to keep a record of what goes in and goes out?

Answer. Yes, sir; but he does not keep a record of the quantity bought and sold on 'Change. No record is kept of that.

Question. Is there not a thousand times as much grain bought and sold on 'Change in Chicago in a year as is received or shipped out of it?

Answer. I could not testify as to that.

Question. Will you swear that there is not?

Answer. I have never gone into the subject deep enough to testify.

Question. Will you swear that in your judgment there is not?
73 I am asking now your judgment as a member of that board; knowing what is done there, in your judgment, if there is not a thousand times as much?

Answer. The same 5,000 bushels, being bought and sold so many times; you might buy 5,000 bushels cash wheat and sell it out five hundred times during a day, and that same 5,000 bushels going through a hundred hands, it would be delivered, and the whole transaction would aggregate 500,000 bushels. You can't count that as half a million bushels of wheat.

Question. Is there not a thousand times as much bought and sold on 'Change in Chicago in any year as is shipped in there during that year?

Answer. I cannot testify to that question.

Question. Will you swear that there is not?

Answer. I cannot swear one way or the other.

Question. You won't deny it?

Answer. I cannot deny or affirm it.

Question. Is there not ten thousand times as much grain bought and sold in Chicago during a year as is shipped in there during that year?

Answer. I am inclined to doubt it.

Question. Do you doubt that there is a thousand times as much?

Answer. The same wheat changes hands so many times.

Question. Suppose you call each one of those changes a sale. On that basis is there not a thousand times as much bought and sold during the year as is shipped in there?

Answer. I don't look at it in the same light that you do.

Question. Please answer my question. On that basis is there not a thousand times as much nominal as actual changes; yes or no?

Answer. How do I know?

The COURT. State you don't know.

Answer. I don't know.

74 Question. In any of these transactions for the defendant, was anything delivered or paid for; if so, which of it?

Answer. I could not tell which, but one lot of cash grain and cash lard was. Some of that grain came into the office.

Question. And you charged it to him?

Answer. He had nothing further to do with it; we paid up for it, and——

Question. I am asking you if you received from anybody or delivered to anybody any articles you bought or sold for the defendant?

Answer. I think probably we did. He might have bought this April pork and sold it. When the month came we might have delivered that out. I should hate to swear we did not handle any of it.

Question. Did you receive as his or deliver as his any of these articles?

Answer. That is a question difficult to answer. We have taken in pork and lard during that month—our books will show whether we have received these articles. I know from whom we bought these several articles. Our books disclose that we bought most of the provisions from Armour & Co., and it was delivered to us.

Question. Was any of this property that you say you bought for the defendant ever received by you as his agents; he to be the owner and pay for it, or delivered by you for him, he to receive the purchase price? I don't ask you now whether at some time after he had been sold out you got some of this property, but whether you received it as his, paid for it for him, or had anything to do with it as his more than is indicated by these papers?

Answer. If Mr. Rountree had April pork bought through us, and had
sold it before April came, and we had not made a trade for anybody
75 else on our books, we would have received it and delivered it out;
we would have given our check for a certain price and delivered it
to another commission merchant, and got his check. If we had got anything for Mr. Rountree that day we gave our check for it and got their check for it; we took in a large amount for different customers that came in there, and sold it out just as soon as it came in—coming in means between the hours of nine and half past two. If you have anything for April. If anybody had the cash stuff they will bring it to you; they will bring the elevator receipts—that receipt is a receipt for property—they will deliver it to me, and I have to receive it; that's what I mean by coming in, delivering—it is delivering.

Question. You mean warehouse receipts; if you had sold that to somebody else before the end of the month, you would get the difference; if you sold it for less than you gave for it the check would be less than you had paid; while if you sold it for more than you had paid, the check would be more than you had paid. In such a case as that did you, as agent for the defendant, receive for him or ever say to him in any way that you had received for him any of these articles bought for him? Did you ever say to him in any way that you had ever received anything for him?

Answer. He had nothing more to do with it after he had sold it, but it could not be delivered till April. It was sold by him but not delivered; when the month of April comes in we send it out.

Question. The course of dealing is this: You had bought for Mr.
Rountree 2,150 barrels of pork for delivery in April; the next day
76 you sold that pork to Judge Cothran and execute to him a contract
or paper such as you have shown here?

Answer. Yes, sir.

Question. Do you want the jury to understand you that after you had sold that you were still going to receive it at the end of the month?

Answer. I deliver it to Judge Cothran; that was the month of April. You were talking about future delivery. You don't mean in the month of April; you mean previous to the month of April I had sold to Judge Cothran. When April comes I deliver it to Judge Cothran. I deliver it to the commission merchant or whoever has bought it.

Question. If in this case suppose Judge Cothran buys for Mr. Gregory. You sell to him as commission men; you execute a written contract with him. If the man from whom you bought tenders you that receipt, you give him your check; you then send it by your check to Judge Cothran and you get his check, and it may pass through 50 or 100 hands?

Answer. Yes, sir.

Question. Is there not some other way of doing that?

Answer. If you are able to settle it before the day comes round. It is never the case that all is settled. You cannot always settle. A great majority are settled.

Question. Explain the process of settlement.

Answer. The difference is settled the same as the difference at the clearing-house. One bank owes another $100,000; that owes a third $100,000, and the third owes the first $100,000, and it is settled and no money changes hands. We have a settling room in the board of trade, where these differences are settled. But you cannot settle that way where it does not make a ring. If you have the stuff bought, of course, as
77 we had in this case, we are very certain to get the stuff. I meant by the reference in the letter of March 29, to what "Hutch." was going to do with the market, that we apprehended that the firm of Hutchinson and Co. would go in and buy a very large amount of pork, which would tend to put the price up. If they should do that, it would naturally put the market up; I don't know what Hutchinson's reason was for buying but I had the idea he was going to buy. I was led to think so because rumors are all the time flying on the board of trade.

Question. There is a statement in your letter that Armour & Co. were going to do something. Is it not a practice among such men as Armour and Co. and Hutchinson & Co. and other houses to "bull" and "bear" the market, as it is called?

(To this question the plaintiffs, by their counsel, objected, and the court sustained the objection and ruled that said question should not be asked; to which ruling of the court the defendant, by his counsel, then and there duly excepted. 1st exception.)

Question. Did you not mean by that statement in that letter that Hutchinson was a bull and was going to bull the market?

Answer. I think I answered that question. If anybody wants to buy a large amount of pork, that forces the market up.

By the COURT. That's the way they bull the market.

Answer. Yes, sir. "Bull" means up. "Bear" means down. By changing April lard to May, I mean putting off the delivery one month. In other words, we sell for April and buy May.

Question. That's all it amounts to?

Answer. There is a difference in the price.

Question. It simply amounts to this: It means nothing more or
78 less than getting somebody to take that contract off your hands?

Answer. You buy the same stuff and the same amounts. It is the same except the insurance, storage, &c. Not the same particular articles, but the same quantity and the same kind of articles. We go on the market and want to change 5,000 bushels of April wheat to May wheat. We sell that and buy another equal quantity of May wheat.

Question. That is all it means, is it not?

Answer. It means putting the delivery off for one month.

Question. But you actually did deliver it? You actually delivered your April wheat? You have already told the jury that in all these transactions you delivered?

Answer. But you put off the paying for it. If you don't want to carry it you would take it in for another month.

Question. But in effect you completely wipe out the April transaction and make a new one for May, so far as you are concerned, but so far as your client is concerned, it gives him the benefit.

Answer. It gives a client a month more to take advantage of a rise of the market. If not, he can take it in and pay for it.

Question. So far as you are concerned the April wheat is gone and the new lot taken for May, and it is only your client who gets the advantage?

Answer. It puts off the delivery one month, but puts us so we would have the corn or wheat, &c., but we don't have to borrow the money to keep it. We simply sell it to somebody else. We receive that as much
as any other, but we cannot compel the man who sold to us to look
79 to anybody else than us. Then we go to the man to whom we
sold. This occurs as much when we have sold as in any other
case.

Question. As far as you are concerned, you take in just as much of this changed grain as in any other case?

Answer. We take it in and deliver it.

Question. That's all the delivery there is of it? You speak in your letter of April 3 of bulges and breaks in the market.

Answer. The defendant had some property which he was carrying, expecting to get a higher price. As we had had a number of sudden rises and drops I advised him to sell when it reached a high point rather suddenly; that is what we call a "bulge," a sudden drop after that is a break. Ordinary fluctuations we don't take into account—little changes. A change of 50 cents higher on pork we call a "bulge."

Question. In one or more of your letters you advise the defendant to sell "short." What does that mean?

Answer. To sell the lard for June delivery, to sell the lard short for June.

Question. To sell the lard they don't have?

Answer. To sell the lard for June and take his chances for the delivery. There would then be no trouble in getting all he wanted. In other words, it was this: I believed that the market price was going to continue to decline, and I believed there was money to sell lard for a month or more ahead, and he would make the money in the difference between what he bought it for and what he sold it for. That is what we

call selling short. We advised him to do that. I think there was
80 a loss in his doing it. It would have been wise if it had been done a
little earlier. I believe my father and defendant were old acquaintances. I did not know what his business was. I knew where he lived. Did not know he was a farmer. I understood he was a man of means, and afterwards understood he owned farms up at Platteville, where he lived.

Question. What class of persons do you do business for on 'Change as a rule? Are they parties buying for the purpose of speculation?

(To this question the plaintiffs, by their counsel, objected, on the ground that it was immaterial; and the court sustained the objection, and ruled and decided that said question should not be asked. To which ruling of the court the defendant, by his counsel, then and there duly excepted. 2nd exception.)

Question. Is it not a fact that ninety-nine one-hundredths of the persons for whom you do business in Chicago on 'Change are known to you to be persons who have no expectation or intention of receiving any property they buy, but simply buy for the purpose of settling on the different margins?

Answer. It is difficult to answer that question. We have large orders to buy from New York, and when it is due we ship it, and when we bought it we did not know it was to be shipped. I cannot say that, for the largest proportion of our customers buy and sell without intention to receive the property, but to settle gains and losses by the payment of differences. If we buy a large amount of stuff for future delivery, and the market should advance considerable in the mean time, they settle it; but if not, they would take it in and forward it.

Question. Don't you know that ninety-nine out of every hun-
81 dred settle their differences instead of delivery and payment?

Answer. The larger number are settled by the payment of differences?

Question. The question is, is not that proportion of them and more settled in that way rather than in any other way, according to your own experience of them?

Answer. A large number of them are settled in that way. It depends on the market; if there is a falling market.

Question. Far the largest number of them are settled that way?

Answer. It depends on the market.

Question. Taking the market from year to year, is it not true that ninety-nine hundredths of them are settled that way?

Answer. A large number of them are settled that way, I say.

Question. Will you deny that ninety-nine hundredths of them are settled that way?

Answer. I could not affirm or deny.

Question. As to your own business, is it not true that ninety-nine out of every hundred of your customers settle in that way rather than by delivery?

Answer. A large number of those transactions are settled in that way, but many customers on our books settle by delivery. Our customers are in the East, and we ship it to them.

Question. Take the number of persons who deal with you, is not the statement true that ninety-nine out of one hundred of them, taking the year round, actually do settle by the payment of differences, and in no other way?

Answer. I could not state that. A large number are settled in that way, but a very large number of our customers will sell out their 82 property, and we take the stuff in on their purchases, and deliver it out on their sales.

Question. Will you deny that that proportion of your own customers settle in that way?

Answer. I say I can neither affirm or deny.

Question. You have no opinion?

Answer. I think a large amount of the trades are settled by the payment of differences.

Question. Is it not within your own knowledge that they buy and sell and you buy and sell intending to settle in that way; you to exercise your own judgment? You were to exercise your own judgment in this case?

Answer. Yes, sir.

Question. Now, according to your own knowledge, is it not the rule that your customers buy and sell intending to settle by the payment of differences and you for them to settle by the payment of differences? I don't ask as to your opinion, I ask as to your own intentions.

Answer. I can state that frequently we don't know who we are trading for, nor what their intentions are. We get orders from brokers to buy or sell, and their intentions we have no means of knowing.

Question. How did it happen in this case that all these deals without a single exception which were left to your own judgment were settled in that way; where you are left with authority to buy or sell, as in this case, where in these deals you never received one pound or one bushel of anything you bought for the defendant?

Answer. I stated, I thought, we had received grain and provisions on his contracts.

83 Question. If you can show by your books that you received a pound of grain or property for the defendant as bought for him, in other words, if you can show by your books that you ever settled in any other manner than by the payment of differences, will you be kind enough to do so?

(The books of the firm were examined by the witness, and by consent the question was left to be answered by Mr. Lightner.)

Question. If there was a single case, or more, where you took in the property, the rule was that you settled them the other way?

Answer. There is no rule at all.

Question. Then in this case the practice was that you settled them in another way, wasn't it?

Answer. There is no practice or rule.

Question. The practice in this case. I am not talking about the rules on 'Change. I am talking about what you did in this case in settling for the defendant. Did you not settle the defendant's gains and losses by the payment of differences?

Answer. I can positively state that some were settled by the payment of differences and some by delivery.

Question. How many of them can you positively state were settled by the receipt of the property?

Answer. I have not looked over the books enough to see; by just looking at the books one second I can swear that some of them were settled by delivery.

Question. Did you ever have any instructions from the defendant as to how you were to settle these differences?

Answer. No, sir.

Question. Then, what you did do you did by the regulations of your own business?

84 Answer. We had orders to sell and buy, and what we did we acted under the rules of the board of trade.

Question. You never had any instructions from him to do anything contrary to your general course of business on the board of trade?

Answer. We had orders to buy and sell. We got such orders from other people. I don't know whether there was anything different in these from the orders of our usual customers.

Question. If there was anything in the defendant's instructions to you that directed you to treat his case different from the course of business with your other customers, state what it was.

Answer. There are some customers who never trade in anything except with the intention of paying for it and taking it in; others do take in part of it. There are some who sell it before it is delivered.

Question. You are unable to answer my question as to whether he directed you differently from the general course of your business. The question is whether you are able to state whether there was any different instructions received from the defendant about his stuff than is usual in the general course of your business?

Answer. We had orders from him to buy and sell as is customary on the board of trade.

On redirect examination the witness said:

Our firm stood in good credit, and does now, in Chicago.

85 Question. Able to raise all the money you want in Chicago?

(To this question the defendant, by his counsel, objected for the reason that it is incompetent and immaterial, but the court overruled the question, and ruled and decided that the witness might answer the question; to which ruling of the court the defendant, by his counsel, then and there duly excepted. (3rd exception.)

Answer. Yes, sir; I stated that on one occasion we raised a million dollars in our business. During the time of these transactions of Mr. Rountree we had a million of dollars borrowed.)

Business on the board of trade is done in the name of the brokers entirely. The names of the customers are not known to the dealers at all, except to the person who gives the order. When they give us an order to purchase we purchase, and to sell we sell. If he had chosen then to close the transaction up, if the sale had been profit, he would have received his money, and afterwards if the market price of that article should fall ten or fifteen per cent. they would call on us for margins. Our liability continued for the purchase till the actual delivery. Mr. Rountree would have been out of the contract for a month before, and we would have been liable for it till the delivery a month after. That is so in all cases on the

board of trade. In dealing on the board of trade an order comes in to us to purchase. We have no means of knowing what the intention of the party is, whether he intends to receive the actual property or wishes to have it held or sell it at a margin. We act under instructions.
86 We go and buy at the ordinary price, and with instructions to sell we sell without limit. If there is a profit or loss it goes to the credit or debit of our customers.

There is no understanding between brokers on the board that the article purchased is not to be delivered. There was not in any instance where purchases were made for Mr. Rountree any such understanding between us and the brokers. The understanding was that when the time came the stuff would have to be delivered. We remain liable on our contractors until after the actual delivery to the purchaser.

The word "options" in these contracts means if grain is bought for April delivery it is called option. That is, a man sells property and has the privilege of delivering it any time during the month he sees fit, but it must be delivered between nine and half-past two. The delivery is effected by warehouse receipts. They produce the warehouse receipts and the money is paid for them.

The only option is seller's. All the option is the time of delivery. Buyer's option is not in use any more and was not then in use.

In disposing of Mr. Rountree's property we did so as he directed in many instances and in other instances we sold on notice to him as shown in our correspondence.

In recross-examination the witness testified as follows:

Question. Do you want this jury to understand that you actually receive all the goods you buy in that month?

87 Answer. We do if we hold it till the end of the month.

Question. Don't you sometimes buy a great deal more stuff than there is in Chicago?

Answer. We buy and sell a great deal of stuff in the month and unless we get rid of it by some of those systems before the end of the month we have to receive it. All the rules in the book produced (a copy of the rules of the board of trade at Chicago) including rule 23 were in force at this time.

(It was then agreed between the counsel that said rules should be considered as in evidence for all purposes.)

The plaintiffs then called as witness HILTON C. LIGHTNER, the remaining member of the firm of Smith and Lightner, the plaintiffs, who testified in substance, as the preceding witness did, so that his testimony is not here reproduced except such parts thereof as cover the ground not covered by Mr. Smith's testimony or such parts as differ from the testimony of Mr. Smith.

The witness testified: I had some talk with defendant in relation to his having dealt on the board of trade through any other firm before. He told me he had traded through Messrs. Rumsey Bro's. He had bought pork and lard through them on the board of trade. Some of the lard we bought for Mr. Rountree came into our actual possession and I think we have some of it now. There was no understanding or agreement in

any of the purchases made by me for Mr. Rountree between myself and Mr.
Rountree that had not to take the articles or that they were not to
88 be delivered. The subject was never in any way alluded to between him and me. When we bought the property we expected to
receive it if it were not sold in the mean time.

This book I have in my hand is the book in which we enter our trades after coming off from 'Change. On 'Change we enter what we do on cards, and it is then transferred from the cards into this book.

On the 31st of March we bought 250 tierces of lard for Mr. Rountree, at 6.42½. That was delivered to us on the 1st day of May, the day for which the stuff was bought; the actual property came to the office. That is a part of this money in controversy. The money involved was probably about five thousand dollars. That was one of the transactions with Mr. Rountree. I will find another. We did not receive all the property we purchased for Mr. Rountree, because we sold it out on the market under his discretionary orders and his actual orders when he was present at the sale. In case the lard depreciated after we sold it we remained liable for the purchase price until after the actual delivery, notwithstanding Mr. Rountree was out of the transaction. His liability was only up to the time of the sale, and was to us. We were still liable, but the contract was settled to the board of trade. That is so in all instances. We are frequently called upon to put up large margins. I can note an instance which occurred just before I left. We had 50,000 bushels of wheat sold for $1.24½ that must have been sold ten days ago; delivery cannot be made until the first of January; it was sold for January delivery. Well, we
cannot settle that trade in any way, but our customer is entirely out
89 of the market and we stand in the gap, and we had $4,000.00 on
deposit with one of the banks to secure parties. All this time the
customer is out of the market entirely and has received his profits and stepped out, and we had the property sold for next January. If the wheat should go up to 1.50 we would have to pay for it. If we fail to do so, we come under the rules of the board of trade, which means suspension or expulsion, or both.

By the COURT. Would that be all the liability? Would you not still be liable on your contract?

Answer. If we did not put up the margins when called for in an instant they would go into the market and buy.

By the COURT. Would not they hold you for the difference?

Answer. Yes, sir; that is the only liability we would incur, discipline by the board and liability on the contract.

Defendant was not required to put up the ordinary margins, because we believed him to be responsible and honorable.

We were required to put up margins on this identical property. I presume we sometimes had up as much as $10,000 or $12,000 of our own money on this identical property.

I have looked over the account. It represents actual purchases and sales in all instances, and the balance is as stated by this account. The commissions charged are the usual commissions charged on the board of trade. In our accounts of purchases and sales we always stated our commissions on each item. No objection was ever made to the amount of our commissions.

90 It was then admitted that if plaintiffs are entitled to recover at all they are entitled to recover as follows:

For cash balance or advances	$4,168 75
" commissions	1,243 75
Total	$5,412 50

When Mr. Rountree was in Chicago, in March, we could have sold out all that he had on hand, and make a profit for him, if he had so directed, but we received no such instructions.

On cross-examination the witness testified as follows:

The lard purchased on March 31st was to change April lard into May lard. The lard sold short about the last of April was not sold in pursuance of special instructions, but was sold in pursuance of our general instructions, if we could save anything to do so. This was done in the exercise of our own judgment.

Question. You stated that you received some lard for the defendant, which you bought on the 31st of March; was this the lard that was changed?

Answer. Yes, sir.

Question. Will you be kind enough to find the item charged in his account that you paid for that lard? The question is, when and where in the account have you charged Mr. Rountree with the purchase price of that lard? You say you paid some $4,000 for it; where is that charge in the defendant's account?

Answer. That does not go into the account at all; we were responsible as commission merchants, because we had already sold out the property before the actual stuff was delivered, although it was delivered *although it was delivered* on his contract. We bought the property on his con-
91 tract and it was delivered on his contract; we received it as his
agents, as his property; we sold it to a commission merchant on the board of trade, and got his check for it, but we did not get the money for it; that is in dispute now.

Question. The defendant had nothing to do with it; you had sold it to somebody else, and had got the pay for it at the time it was delivered?

Answer. Yes, sir.

Question. In what way can it be claimed that the defendant had anything to do with that lard on the 1st day of May, if before that you had sold it and got the pay for it?

Answer. We would never have had that lard bought and sold if Mr. Rountree had not given the order; on his order we received it and delivered it.

We bought part of that lard at 6.40 and part at 6.42½. Our accounts do not show to whom we sold it. We charged Mr. Rountree the difference between what we bought it for and what we sold it for, the difference between our checks. It was sold on the 15th day of April. We sold it on account of defendant 16 days before it was delivered. We bought that lard as agents for defendant. At another day we sold it as his agents. We did not receive any margin when we sold it. We waived it voluntarily, I cannot say why. It was not defendant's fault. We had the absolute right to insist before we made the trade that the commission man should give us security for the payment of it.

Question. Now, then, if you did not require that of him you can't charge that to the defendant, can you?

Answer. Well, you are away off in a fog. I cannot begin to answer such questions.

92 Question. You say you were responsible for the defendant, don't you; and you say you received the property on his account?

Answer. Yes, sir.

Question. Now, you tell the jury that before you received it you had sold it to somebody else, and you had taken security, or voluntarily waived it. Now, how can you hold the defendant for it?

Answer. The defendant bought and sold the property. There was a loss in the transaction, and we had bought and sold the property and received the property and delivered it on his account, and there was a loss in it.

Question. Was all that settled with you?

Answer. On the 1st day of May when the property changed hands by means of the margins.

Question. What is the date of your statement of the account?

Answer. The 15th of April. On that day we charged the defendant the difference between what we bought it for and what we sold it for.

Question. Was not that the way the difference was settled?

Answer. So far as the contract goes, sir, the contract was involved until the 1st day of May.

Question. You had somebody else responsible for that contract after that, was not that true?

Answer. No, sir.

Plaintiffs' counsel. Please to explain the transaction to the jury; the purchase and sale of that lard.

Answer. On March 31st we bought this property at 6.40 and 6.42½. On April 15th we sold it at 5.92½, 500 tierces. The property was, seller May, to be delivered to us in May, and we had to deliver it out in May on
93 the contract; that property could not be settled for between commission merchants until the 1st of May. The first day of May we received that property we bought on his account. In the mean time we had margined that trade, probably, that we had bought, and had the margin up till the day of delivery. We had put up the money in some bank there to secure the person of whom we had bought the property. We could not settle the thing until the first of May. In the mean time we may have had the money up on that sale. For instance, we may have sold that property on the 15th of April, and by the first of May the property may have gone up, and then not only having margined it on one side we had to margin it on the other, and it could not be completed until the 1st of May.

By a Juror. It was said that you sold it on the 15th of April; the original purchaser had nothing more to do with it?

Answer. It was in this way: We bought the property on his account, and secondly, we received the property on his account, and on the 1st day of May we sold the property out on his account.

Question. Until the day of delivery this was an agreement to sell instead of a sale?

Answer. Yes, sir; and it remained a contract until that time.

By a Juror. Mr. Smith swore that the purchaser had no more to do with the transaction, but now it seems the sale is not consum'ated until the broker——

Another JUROR. If the defendant has bought this lard and if his price is declining, if it has gone down rapidly he wishes to have his agents
94 sell that; and it is sold before the time of delivery, he has already lost on the purchase price. I want to know if, after this agent has sold this article, if the article has then passed out of the agent's hands so far as future losses are concerned, it is sold out for a loss, and he tells the agent to sell, it completely passes out of his hands and any loss that may come after that time, after that, who has the losses?

Question. We would be the responsible parties, because we had received orders to sell the property out.

The JUROR. After he had sold it, is it in the original purchaser's hands or not?

Answer. After the time of the sale he did not lose any more; after the 15th of April, although the broker was responsible.

Question by DEFENDANT'S COUNSEL. Then, after that, whatever further loss there was would be the loss of the purchaser from Mr. Rountree from you?

Answer. Yes, sir.

Question. And then the defendant would in no way be responsible in the mean time, because after the 15th of April there was no responsibility in any way, shape, or manner?

Answer. No more than he had made us his agents and we had bought, and he would not be out until the property was delivered. He would not be responsible for any loss after we had sold the property, on April 15th. If we did not get margins from those to whom we sold it was our own voluntary act. We had the right when we sold the property to compel the other party to put up just as much margin as we put up.

95 Question. The same certificate that you say you received 16 days after it was sold as defendant's property might have been delivered to twenty different firms?

Answer. We don't transfer the receipt. That can be done through the warehouse. They have warehouse receipts for grain and packing-house receipts for lard and provisions. We get no receipts until the day of delivery, whatever that day may be. Down to that time the transactions are only indicated by these other verbal memoranda. Verbal sales such as we make by entries in the book, or by such contracts as the one produced here in this form covering this transaction. When it is delivered to anybody else for his account, the warehouse receipt is all that is delivered. This warehouse receipt which we receive on the 1st of May for seller May. I don't think that warehouse receipt settled any other transaction than this one. I think it came into the office and stopped there. The packing and provision company delivered the receipt to us. I could not say who was the party carrying that property at that time. It was delivered on the defendant's contract.

Question. Was the defendant carrying the property?

Answer. It was delivered on his contract.

Question. I ask if every one of the defendant's contracts was not settled by the payment of differences?

Answer. No, sir; by the actual delivery of the property.

Question. Every one of them?

Answer. No, sir; I won't say every one of them. I will say this one was.

96 Question. Then if the measure of his losses to you was determined by delivery you charged the losses 16 days too soon.

Answer. No, sir.

Question. But you charged the losses on the 15th day of April?

Answer. Yes, sir.

Question. And you now say it was not settled then. The property remained his till the 1st day of May?

Answer. The property was not settled till the first day of May.

Question. But the defendant's losses to you. His liability stopped on the 15th of April, and on that day you charged to him the losses that he had suffered on that trade?

Answer. Yes, sir.

Question. Was not that the case with every one of his transactions with your firm?

Answer. I cannot answer that question. I can only say that part of them were, and part of them were not.

Question. I will ask you to answer that question definitely after examining your books, and if there was any instance where the difference was settled in any other way, I will ask you to produce it?

Answer. Yes, sir.

Question. Did you ever receive any instructions from the defendant as to how his business with your firm on 'change should be done? I mean how his losses and gains should be settled?

Answer. No, sir; they were settled according to the usual course of business. I think the mode in which his losses and gains were settled by us is the mode prevailing on 'change in Chicago where these contracts were made.

97 Question. I will now ask you as I asked Mr. Smith, if it is not a fact that 99 out of every 100 of these contracts are settled by payment of differences by the parties?

Answer. No; I do not know; I could not say that, I will not swear from my own experience that it is not a fact, or that it is. I will not swear that there is not 499 out of every 500 trades made within my knowledge, made by one firm, settled on a payment of differences.

On redirect examination witness testified as follows:

After identifying the forms of contracts used on 'change, and identified also by Mr. Smith, witness said:

Under these contracts in the purchases for Mr. Rountree we remained liable on the contract until the contract is fulfilled. By fulfill, I mean the delivery of the actual stuff or settling the contract between the original seller and the last purchaser, who ever he may be. He can avoid the delivery by settlement between himself and the last purchaser, and he settles the contract. In that case there is no delivery; but for that the actual property is delivered; that is the actual dealing. I will not undertake to state the proportion of actual deliveries to the cases in which the contracts are settled in some of the ways I have explained. I won't undertake to deny that they are 500 to one. I won't affirm or deny.

I have looked in the books of our firm to see whether any of this
98 property which was bought or sold for the defendant was ever de-
livered or received while he was the owner of the contract. I have taken just a memorandum. It states that the transactions are where the property was delivered on May 1st. I think that was bought on the first day; I cannot tell what day it was from these notes. On April 1st our books show that we received 250 tierces of cash lard on the contract of Mr. Rountree, and on April 1st, 250, at 6.85; that settles the contract. The actual delivery settles the contract. The contract is open until the property is actually delivered, or until the original seller settles with the last purchaser.

Question by defendant's counsel:

Was Mr. Rountree the owner of that contract at that time?

Answer. Smith & Lightner, as his agents, were the owners of that contract.

Question. Was Mr. Rountree the owner of that contract at that time, or had you sold it for him before?

Answer. We had sold the contract before for Mr. Rountree.

Question. Now the next instance, please?

Answer. Well, there was 250—there was some lard on the 1st of April; there was also 250 lard on the 28th of February for the 1st of April.

Question. Do your books show the actual owner of the contract, who was responsible to you for the purchase of that at that time?

Answer. I don't think I could tell from these books. Smith and Lightner were the responsible parties for the contract at that time, unless
we had somebody else responsible back to us. Our books don't
99 show who the responsible party was, but I have books from which
I could ascertain that, but that book won't show. I don't know whether the books show what was the date of the sale of that contract by us on account of Mr. Rountree, the one I have just spoken to the jury about. The date at which the difference is charged up to Mr. Rountree is April 15th. The contract on which we received the property on April 1st was sold for Mr. Rountree on March 27th, so that we received the property. Mr. Rountree was not the actual owner of the contract. He had sold the contract, but it was sold in Mr. Rountree's name on our books. His liability was at an end on March 27th. He had lost on that contract and the loss had been charged to him on March 27th. There was one on March 28th, just exactly the same thing for the same amounts.

Question. That was received on the 1st of April for somebody else?

Answer. 250 tierces more on the 28th of February bought. They have omitted to put the date of the statement but it must be the 28th of March. The purchase was on the 28th day of February. It must have been on the 31st day of March. Mr. Rountree is a loser in that transaction. On the 31st of March the loss in that transaction was charged up to him. The property was received the next morning. We received it on account or somebody else. March 1st, 250 received was sold March 1st, same as 250 just explained. There was a loss on that transaction and his responsibility ceased on March 1st. The contract had
been sold to somebody else, and somebody else was the owner of it.
100 Those are the only instances I have found where the property

dealt in on Mr. Rountree's account was received by us on anybody's account, or ever came into our hands.

Ernest F. Smith, being recalled by plaintiffs, testified as follows:

We remained liable on those contracts until we had either received the property mentioned in the contract or until the contract was consummated by the original seller through the broker with the last purchaser, and if either one of them did not wish to deliver and the other to take, the last purchaser goes to the original purchaser and settles with him through the broker, and consummates the contract. Unless a settlement takes place the property is delivered in all cases; that is the universal rule.

On recross-examination, the witness testified as follows:

"Ringing out" is a slang phrase. Settlement is the term used. The manner of settlement is: The man originally selling settles with the last purchaser. There may be half a dozen firms between them. We have among ourselves a clearing house like that among the banks. So long as the original seller is not willing we cannot demand a settlement. If they are willing, a settlement can be demanded. I cannot affirm or deny that 499 out of every 500 deals are settled without delivery in my own experience. As I have said before, a very large proportion of the trades are settled in that way.

(It was then stipulated that the revised statutes of Illinois of 1877 are in evidence in the case, and may be referred to by either party.)

101 And thereupon the plaintiffs rested their case.

And thereupon the defendant, John H. Rountree, was sworn as a witness on his own behalf, and testified as follows:

I think the first time I saw Mr. Smith was about February 1st or 2d. The first time I saw Mr. Lightner was about a week or so later. I called to see Mr. Smith in the morning. I was going home that day, and asked him if he was dealing in what are called options. I said I thought I would like to buy some pork, and asked him what margin I should put up, and he said about fifty cents a barrel. I think I told him to buy a thousand barrels and I would send the margin from home, and I did send it. I think I went to Chicago and stayed a few days; returned home and went to Chicago again early in March, I think. I did not see the letter or telegram from Smith & Lightner to me, of March 6th, asking for margins; nor did I hear that they had been sent until about March 23d—between March 20th and March 24th; I think on the 23d. I think I went to Chicago on March 6th; early in the morning. The trains leave my place after five o'clock in the morning. I went directly to Chicago. I saw both the plaintiffs there. Nothing was said by them to me at that time about my being required to put up money, or any allusion to the fact that they wanted money. I never heard a word about it until afterwards. During that visit to Chicago I introduced the subject of my financial relations with them myself on the morning of the 11th of March. It was just out of the door where they had their morning board—their
102 morning call. I said to him that I wanted to talk to him a little in relation to business matters. That I did not know; that I thought things showed fair enough; but, said I, I want you to understand that I don't intend to put up a dollar more than I placed in your hands.

I had then placed in their hand $3,150. I want you to understand that I won't put up a dollar of margins more. There will be profits made, but I won't be accountable or put up a dollar.

Question. Anything more said?

Answer. No, sir.

The COURT. What time was this?

Answer. It was on the morning of the 11th; I think the eleventh or twelfth; I think the 11th at Chicago. I took the train immediately after, and took the train and went to Milwaukee and returned in the evening. That was in substance all of the conversation. I have no recollection that from that time out any demands or calls were made upon me for money or requests for money. I was in Chicago a good part of the time, until about the 12th of April. I have no recollection of any demands or any expectation expressed that I would put up any more money until the morning—I think it was the 12th of April. I had been to Milwaukee to meet with the Northwestern Mutual Life Insurance Company, of which company I am one of the trustees, and was on my return, and was at my son-in-law, Mr. Jewett's, in Chicago, and was waiting to take the ten o'clock train for home. Mr. Lightner came to me and said he thought there would be about $500 short, and wanted me to make arrangements, if I had not the money to let them have, to pay it before a great 103 while. In answer I said to him, "Mr. Lightner, I have not got the money. I have informed your partner that I don't expect to put up any more." Well, he wanted to know if I could not make arrangements to pay it in a few weeks. I told him that I could not; that he could not and need not depend upon me. I am not aware, and don't remember that I have seen either of them since then until I met them here. That is all that has ever occurred between us relating to money or this business, except what is contained in the documentary evidence. There was never a word said between them and me respecting the delivery of the property bought by them for me. I had no conversation with them respecting the manner in which this business was to be done, nor respecting the manner in which my gains or losses were to be settled or adjusted except what is to be found in the correspondence. I believe I have related everything that passed between them and me relating to my obligations to them, or money transactions with them, or manner of doing business, except what appears from the letters and telegrams. I was frequently on the board of trade with the gentlemen, one or the other of them, most frequently with Mr. Smith, and I could not say that they did not buy anything for me, and I could not say that they did. I have no particular recollection as to how they bought or who they bought for. I have no recollection. They never notified me orally or personally that they had received or were liable to receive any of the goods. I knew nothing of the manner in which they bought and sold. They may have given me the prices they paid or agreed to pay, the matter not being fixed on my mind. I 104 have no recollection about it. I could not say that I had any understanding on the subject of the nature and character of the board of trade deals, whether the property was to be actually delivered or whether it was to be settled for; nothing was ever delivered to me. I did not know anything about how those matters were settled on 'Change; nothing was ever delivered to me.

On cross-examination the witness testified as follows:

I think I was in Chicago in the month of March. My recollection is that I left home early in the morning of March 6th, and reached Chicago on the same day. I don't think I left home on the 7th. I think I remained in Chicago between two and three weeks, and while there, and about March 11th, I had the talk with Mr. Smith. I could not say whether I was on the board of trade with him on March 11th or not. I could not say whether I purchased 1,000 bushels of May oats in Chicago, on March 7th, nor whether I purchased 750 on March 18th.

Question. And on March 20th you had purchased 700 barrels pork, and 1,750 for the month of June while you were present on the board of trade?

Answer. I did not purchase anything.

Question. They were purchased for you?

Answer. Very likely.

Question. Two bills were rendered. You have seen them?

Answer. Very likely.

Question. And the 6th of March you purchased 250 bbls. of May pork, and on March 18th they sold 500 bbls. of pork for you, and made you a bill of it?

105 Answer. That is very likely, for I thought I had four or five thousand dollars in their hands.

Question. On the 27th of March they sold 750 bbls. pork for you there. Do you want this jury to understand that you had made this declaration to Smith on the 11th, and yet had these men make the largest purchases?

Answer. I want these men to understand that I put in $3,150.

Question. Do you wish the jury to understand that you had told Smith on the 11th that you would put nothing more in, and then go on the board of trade, and then make the largest purchases in the whole of your dealings with them?

Answer. I want this jury to understand that on March 11th I told Smith that—I say I told him that at that time I supposed I had about $4,000 in their hands, money and produce.

Question. I insist upon an answer to my question. Now, then, upon whose capital were they dealing for you, sir, from the 11th to the 21st, when you went away? Did you put up margins?

Answer. What did I say I told him on the 11th of March?

Question. Is that your explanation?

Answer. Yes, sir. I don't know the date I left Chicago on that occasion, exactly; some time in March; I should think I left on the 23d.

Question. Now, I want to call your attention to two telegrams: A telegram from the plaintiff to you, "May pork, 10.20; wheat, 93;" your telegram to them of the 26th, "It would be well to hold awhile." By
that you intended to include a number of purchases while you were
106 there in Chicago, between the 6th and 21st, didn't you?

Answer. Leave it to their discretion. I simply gave them my opinion to hold. I don't dispute it; simply gave them my opinion.

Question. On the 29th, you gave a telegram to Smith & Lightner, "Hold my stuff until the best price be got. Telegraph." That is the 29th of March. Now, did you intend by that, that they should hold the stuff, purchased between the 7th and the 21st, as well as what had been previously purchased?

Answer. I intended them to understand that I would put up no more margins, and to do the best they could.

Question. I read to you the telegram which you sent on the 29th of March, "Hold up my stuff until the best price be got. Telegraph." In sending that telegram did you mean that they should hold the stuff that they had purchased between the 7th and the 21st of March, while you were in Chicago, as well as what remained unsold in the previous purchases?

Answer. They knew my instructions.

Question. Now, sir, did you intend to include the property purchased in March, as well as the previous purchases?

Answer. I will just answer as I did just now, they knew my instructions. I wanted the best price I could get for that stuff.

Question. Did you mean hold all the stuff?

Answer. Well, I can't tell now what I meant exactly, but that is the reasonable inference, but I meant the best they could do any my opinion was to hold it.

Question. And they did hold it?

107 Answer. But they knew my instructions of March 11th. I don't think I know the name of any person of whom any of this property was bought by Smith & Lightner, for me; I never talked with any of them; I never had any understanding with any of the people from whom Smith & Lightner purchased any of the property, that I know of. The bills in evidence were received from the plaintiffs by me, but I cannot tell when I got them; I cannot remember. Don't recollect getting any of them while I was in Chicago; don't know how I got them; may be they mailed them to me; don't know but they mailed those accounts to me promptly. I have made no complaint on that account; I don't think I complained of them not being prompt in advising me. My recollection is vigorous for ordinary business. I did not keep any memoranda of the dates of these purchases; I don't remember the purchases particularly; I remember they purchased large amounts for me; I did not hear them sell any and don't remember that I was present when they purchased it. I have no recollection of their furnishing me an account of sales there at all. My recollection is good on matters of sufficient importance to me, but when they had made a transaction I keep a record, and those bills are the record I kept. I went down there I think on March 6th, and must have remained there till March 22d, so that I was there more than two weeks. Was in the office frequently; I went upon the board with them frequently; I had large interests in their hands. I cannot
108 tell when I made the purchases. They purchased for me under
their advice frequently; I don't know how much, I presume I did know at the time. The written instruments I then supposed, and have ever since supposed, contained the dates, amounts, &c. It was a large transaction; they may have consulted with me about the purchases while I was there. They were acting as my agents in the purchases and sales they made for me, and I may have advised them as to the propriety of making the purchases and sales and prices; I cannot say whether I did or not. I cannot say that I have any recollection on that subject; my recollection is

good on such things as I charge my mind with. I think it is fair and good.

Question. Was your recollection better on the 16th than on the 11th?

Answer. I supposed they would make the purchases and sales. They knew exactly what I had told them, and they had their option to do it or not to do it. I did not propose to step out and leave the profits and losses if they made it. I had confidence in them, and I told them time and again, and wrote to them, and depended on their judgment, and if they advised it I consented to it. The bills show what they did. I would not say to the contrary. They made some purchases. Whether they made large or not they are all set down. I don't dispute the bills. I was there on the 18th of March. I do not particularly remember that they sold 5,000 barrels pork on that day. I think those papers all came home after I got home. They may have told me there that they had sold. I
do not know anything particularly about their purchase of March
109 20. They may have told me about it, but I don't remember the
particular amount. I undertake to say that I did not know the amount. I was there, and they——

Question. Answer my question. What do you call a large amount—3,000 barrels?

Answer. If that is what you call a large amount I should say that they purchased a large amount.

Question. Do you remember about their purchase of 5,000 barrels on the 18th?

Answer. No, sir; not particularly. I remember distinctly of the sale when they could sell and make any profit at all.

Question. Did you not go right on after your return home, on March 22d to the 22d of April, directing them to hold or sell, or this or that or the other, and did they not write every day almost the condition of the markets, &c.?

Answer. Not the most of the time. I had communications with them, and wanted them to do the best they could, and sometimes I indicated what I thought about it, but did not tell them to comply with my notions about it at all, for till that time I supposed they had a balance in their hands for me. Until April, until he came and wanted me to arrange for $500, I supposed there was a balance. I had placed over $3,000 in their hands, and they had sold things to increase that balance to $4,000, and I was afraid they would lose all that. Very likely I wrote to them long after I went home, on March 22d, and complained of misfortunes, the
market running against me, and that I did not know what to do.
110 I was afraid that it would absorb all my money that I had put in.
I did not think that had been absorbed. They never asked me to put up a dollar till April. I supposed I had money in their hands all the time, and may have asked them to buy or sell, thinking I had money in their hands. I recollect that I kept instructing them and advising them, saying to do as they thought best, a long time after that transaction, and I knew that the price was ruling low, and that they were selling at rates which were ruinous, taking the most of my money in their hands.

Question. Did you not know and did you not state that the rates were ruinous?

Answer. Absorbing all the money that I had in their hands; a large share of it at least. When I got back from Chicago on the 22d I think I found at Platteville this letter and telegrams asking for large margins, but I had been with them two weeks, and they had never told anything about it, and things looked prosperous. I felt I was interested, and had a right to control and advise. I had no idea there would be any losses. I said I wanted them to sell and do the very best they could.

Question. On April 17th they telegraphed you, "What shall we do with the rest of your stuff?" Your answer, dated same day, is, "Do the best that you can with the stuff; either hold or sell as you think best; prices are ruinous now." Is that your dispatch?

Answer. Yes, sir.

Question. Then you knew that prices were ruinous, and the thing was a losing market?

Answer. Yes, sir; I thought they wer'. Mr. Lightner had told me a
few days before that he wanted some more margin, and I told him
111 that I could not put it up. I was born in 1805. I don't perceive
that my recollection is worse than it has been. I don't perceive any depreciation. It is possible that if 20 years ago I had bought 5,000 barrels of pork I might have remembered it more particularly; and so if I had sold it. As to the particular dates of purchases and sales and the number of barrels I don't recollect distinctly, and don't know that I ever did. I supposed that the accounts and books would indicate those things. There was the circumstance of all my means being absorbed, and I took measures to prevent that.

Question. Well, the first measure you took was to buy 3,700 barrels of pork?

Answer. The men knew exactly the terms.

Question. You went in and bought the pork there, though?

Answer. They bought it for me. They knew exactly how the account stood and my views upon the subject.

Question. That you wanted to make a little money?

Answer. Yes, sir; and they knew that I would not put up any more margins.

And thereupon the defendant rested his case.

And thereupon the plaintiffs, to further prove and maintain their case, recalled as a witness said ERNEST F. SMITH, who testified in rebuttal as follows:

Question. Did Mr. Rountree, on the 11th of March, in the city of Chicago, just out of the door where the morning calls were being called on
the Board of Trade, say to you in words or in substance, "I said
112 that I want you to understand that I don't intend to put up a
dollar margin more. I will not be responsible or put up a dollar more?"

Answer. Nothing of the kind, that I remember.

Question. Did he say so?

Answer. I think he did not.

Question. Have you ever heard of his not having a dollar more to put up? Did you receive his letter of April 23rd; was that the first you heard of it?

Answer. That was the first intimation I had of Mr. Rountree's not intending to stand the losses. On receipt of that letter Mr. Lightner went to Rountree's son to find out what that meant; he could not understand it. I was at home there when Mr. Rountree was there from March 7th until March 22d in Chicago. I was there and made trades in Mr. Rountree's presence, sitting at my side, and when a trade was called out he understood it. I would like to further state in that conversation with Rountree that I remarked about the $3,000, and Mr. Rountree said he had not heard anything about it; and I said that probably it reached Platteville after he left there, and the markets were better now. Mr. Rountree said something about losing any more money, but nothing about selling. Did not want to lose any more money. It was in reply to the information about the $3,000.

And to further rebut the defendant's case the plaintiffs recalled MILTON C. LIGHTNER, who testified as follows:

I was in Chicago on April 12th. I heard Mr. Rountree testify here. He did not tell me there on the 12th of April, or on any other time, 113 that he told my partner, Mr. Smith, that he had no more money to put up, and wanted it distinctly understood that he would not be responsible for a dollar more. I went up to Mr. Jewett's and saw him. Of course I cannot recollect the conversation, exactly the words; but I told Mr. Rountree that the margin, as it stood that night, was $500 against him. I told him at the same time that the market closed $500 beyond his margin on our books, and for two trades closed out that night he would owe us $500. He said he did not have any more money, cash money, now. I said of course you can get some. He did not want to do this. He said you carry the trades, and whatever you do will be satisfactory; he looked to us. The first intimation I had that he had not any money, or did not intend to put up any more money, was his letter of April 23d. After I received that letter I called upon his son to know what that meant, and then wrote the letter of April 25th.

And thereupon the plaintiffs rested their case in rebuttal.

And thereupon the defendant, JOHN H. ROUNTREE, was recalled as a witness in his own behalf, and testified as follows:

I did not say to Mr. Lightner in the conversation I had with him when he asked me for money in April last, that I wanted them to go on and carry my deals, and whatever they did would be all right. I did not say anything of that purport that I then considered or now consider of that purport. I did not make any promises to them at that time that I would repay any advances. I did not mean to, and I did not.

114 On cross-examination the witness testified as follows:

Question. Mr. Rountree, I will read to you from a letter written by Smith and Lightner, dated April 25, 1879. Counsel read the letter of that date, and contined: You received that letter; did you ever say to them that you did not say to Mr. Lightner in any letter or verbally?

Answer. Where is my letter in answer to that? I wrote a letter soon after that.

Question. The next letter you send to them is the 8th of May. Nothing in that of that kind. Why, if that statement were not true, did you not repudiate it?

Answer. I presume I did not consider it necessary to repudiate it.

Question. You knew his understanding that you had said so, and he acted upon the assumption that you had said so?

Answer. I knew what the letter said to me, of course, and I did not consider it necessary.

The following is so much of the rules of the Board of Trade of Chicago, read in evidence before the said court and jury, as relates to the questions raised in this cause by the exceptions of the defendant.

RULE XXIII.—*Margins on time contracts.*

SECTION 1. On time contracts purchasers shall have the right to require of sellers as security ten (10) per cent. margins, based upon the contract price of the property bought and further security from time to time to the extent of any advance in the market value above said price. Sellers
115 shall have the right to require as security from buyers ten (10) per cent. margins on the contract price of the property sold, and in addition any difference that may exist or occur between the estimated legitimate value of any such property and the price of sale. All securities or margins shall be deposited either with the treasurer of the association or some bank duly authorized by the board of directors to receive such deposits, provided such deposit shall not be made with any bank or banks to which the party calling for said security or margin expressly objects at the time of making such call; but in such case the deposit shall be made with some duly authorized bank not thus objected to or with the treasurer of the association as the depositor shall elect.

SECTION 2. * * * All deposits so made shall be held to have been made as security for the faithful fulfillment of any contracts made or to be made between the parties during the time the deposit shall remain unpaid, provided that it shall be competent for either party to a contract to demand that the certificate shall express the particular contract upon which the deposit shall have been made, and in such case the deposit shall be applicable only to the settlement of that contract.

SECTION 5. Should any party called upon as herein provided for, fail to deposit the security or margin called within the next banking hour thereafter, the party making the call shall have the right, if he be the seller, to resell the property for the account of the delinquent, such resale to be for the same delivery as was named in the original contract;
116 if he be the buyer he shall have the right to purchase the property for the account of the delinquent deliverable at the time named in the original purchase; in either case he shall at once communicate to the delinquent the action he has elected to take and all losses or damages on such defaulted contract shall be at once due and payable as though said contract had fully matured. The party so calling may however elect to permit the contract to stand, in which case no notice to that effect shall be necessary to the delinquent. Provided, when the call is made during the general meeting of the association between 11 a. m. and 1 p. m., the deposit shall be made before two o'clock of the same day. All notices for the call of margins or of closing of contracts under this rule may be served on the party called either in person or by leaving a written notice

at his place of business, or may be served in person upon his authorized representative or upon any clerk representing the party on 'Change. And in case the party called upon shall not be known to have authorized place of business a written notice left in the office of the secretary of the board shall be deemed sufficient.

SECTION 7. In determining the value of property under these rules, its value in the market, or for manufacturing or consumptive purposes in this market, together with such other facts as may justly enter into the deter-
*mination of its value, shall be considered irrespective of any fictitious
117 price it may at the time be selling for in this market. Such value, for
marginal purposes in case of disagreement, shall be determined by the board of directors, and communicated to the parties in interest through the president or secretary.

The testimony upon both sides was thereupon closed, and the foregoing is all the testimony offered or given on either side on the trial of said cause.

And at the conclusion of said testimony, and before the argument of said cause to the said jury, the defendant, by his counsel, asked the said court to direct the said jury to find a special verdict. Whereupon the court proceeded to frame questions to submit to said jury, to be answered by them, respecting the matters in issue in said cause; and thereupon the plaintiffs, by their counsel, moved the court to withdraw from and not to submit to said jury any question or questions respecting the legality of the contract or contracts between said plaintiffs and said defendant.

And upon argument and consideration thereof the said court did adjudge and decide that there was no evidence in the case to impeach the legality of the contract or contracts between the plaintiffs and the defendant, and the legality of the transactions between them out of which the action had grown; that said contracts were fair and legal contracts and transactions, and were not gambling or betting contracts or transactions, and did further rule and decide that he would not submit to said jury any ques-
tion respecting, or allow said jury to consider the alleged illegal-
118 ity of the said contracts and transactions as set up and alleged in
the defendant's answer herein.

To which ruling and decision of the court the said defendant, by his counsel, then and there duly excepted. (4th exception.)

And thereupon the court framed and submitted to the jury the following questions, that is to say:

First. Did the defendant notify the plaintiffs or either of them on or about March 11th, 1879, that he would not be responsible for any money beyond the amounts of money they then had in their hands belonging to him?

Second. If he did so notify them or either of them, state, if you are able, whether the amount of money he then had in their hands was sufficient to cover all losses he had then sustained.

Third. If you find that the defendant did so notify the plaintiffs as submitted in the first question, was there any mutual understanding or contract between the plaintiffs and defendant on or about the 11th of March, 1879, that the defendant should not be held liable on the contracts made on his behalf by the plaintiffs beyond the amount of money then already placed by the defendant in the plaintiffs' hands?

Fourth. If you find there was such a contract or understanding between the parties as is mentioned in the last question, did the defendant by his subsequent acts, declarations, directions or conduct waive the same and become liable for further losses incurred over and above the money so placed in the plaintiffs' hands?

119 And thereupon, the defendant, by his counsel, duly excepted to the form of the questions submitted by the court to the said jury and to the refusal of the court to submit any question to the said jury touching the legality of the said contracts and transactions between the plaintiffs and defendant set up in the answer herein. (5th exception.)

And thereupon, the court instructed the said jury in the law of said case, as follows:

GENTLEMEN OF THE JURY. The court has already held that upon one of the issues made by the answer, there is not evidence in the case on the part of the defendant from which the jury could find in his favor upon that issue. The contracts are valid on their face, and there is no sufficient testimony in the case upon which the jury could find that there was any understanding between the parties to the contracts either between the plaintiffs and the parties between whom they contracted in Chicago, or between them and the defendant or between the parties with whom they contracted and the defendant other than appears on the face of the contracts. The plaintiffs both swear that they had no other understanding and that they each understood that both parties had the right to insist upon an actual delivery in every case, according to the terms of the contract. The defendant does not swear that he understood that there was to be no delivery or that the contracts were to be settled by an adjustment and payment of the differences without delivery of the property, but says in substance that he had no understanding about it and there is no testi-
120 mony in the case to show that the other parties to the contract, in Chicago, had any understanding that the contract was not to be performed according to its terms.

There is nothing in the case, then, from which the jury would be authorized to find that the contracts were gambling contracts and void. But the jury should take the contracts as they appear on their face, some of them being in writing; some not, but all alike in substance and form, and valid in law. There can be no question from the evidence that the contracts were entered into by the defendant through the plaintiffs as his agents or brokers and members of the board of trade in Chicago for speculation, the object being to purchase wheat, corn, oats, pork, and lard for future delivery, and hold it for a rise in the market. But such contracts are legitimate and valid. If the defendant wished to take the risk of a rise or fall in the market upon these articles, there was nothing in the law to prevent his doing it, and the contracts which he made through the plaintiffs as his agents or brokers, whether for the purchase or sale of property, were binding upon him, whether the speculation resulted in gain or loss. It might not be prudent for the defendant to enter into such business, but it was neither unlawful nor immoral. The evidence is that these contracts were made by the plaintiffs with other parties in their own name according to a universal custom prevailing upon the board of trade, but were made, in fact, by the plaintiffs as the brokers and agents of the defendant for

121 his benefit and advantage, and under his directions. This being the case, the defendant would be entitled as principal to any gains that might be realized upon the trades so made in his behalf, and there would also be a corresponding liability on his part for any losses incurred. It was his business and not theirs. So far as the contracts entered into by the plaintiffs on his behalf were authorized by the defendant, he would be obliged to indemnify the plaintiffs for any losses incurred and paid by them on the account of such contracts, unless there was some other or different understanding or arrangement between the parties. The business of purchasing grain and pork and other provisions and property was begun soon after February 1st, and continued through the greater part of February, March, and April, 1879. A great many purchases and sales were made during that time, and I believe that it is not denied by the defendant that the contracts of purchase and sale so entered into by the plaintiffs were entered into by them on his behalf as his agents, and either under his special direction or in pursuance of a general discretion and power given them from time to time by the defendant. And so far as that is concerned, it would make no difference with the defendant's liability whether any particular purchase or sale was made by his special direction or by virtue of a general discretion conferred upon the plaintiffs by the defendant, provided the plaintiffs acted in the defendant's behalf in good faith and did not abuse the discretion so lodged in them or
122 transcend the authority given, of which I believe there is no complaint.

But the defendant alleges and testifies that about March 11th, he notified the plaintiffs that he had no more money to put up or pay over for margins, and that he would not advance another dollar or invest, or become liable for anything more in or on account of the transactions; and the substance of the issue which I desire to submit to you relates to this part of the case, there being no dispute about the amount of money the plaintiffs have had to pay on these contracts, or the amount of their commissions.

Unless the defendant has satisfied you of his defence in this behalf, and that there was some understanding or agreement by which the defendant's liability was to be restricted to the amount of money already advanced on each of the contracts, the plaintiff will be entitled to recover the amount claimed.

It was competent for the parties to make such contracts, and the real issue is, did they make it; and if so, did the defendant by his subsequent contract in ordering new purchases and sales, or by his directions and conduct generally in reference to this business, waive such agreement?

If such agreement was made and not waived, the defendant may now rely upon it to shield him from a liability which he otherwise must have incurred. But if no such contract was made or understanding had, or if made it was waived, then, I think, the plaintiffs entitled to recover the sum of $4,168.75, the amount which the evidence shows they paid for
123 losses upon the contracts, with $1,243.75, the amount of commissions, making in all $5,412.50, with interest, which it is conceded amounts to $201.96 more, making $5,614.46.

For the purpose of determining this issue in addition to the finding of a general verdict, I shall ask you to answer specially certain questions in writing, to which I will now call your attention. (The court then read the questions specially submitted to the jury.)

So far as contracts already made on the 11th of March are concerned, the defendant could not limit his liability for any losses already incurred by any act or notice of his.

If he did not wish to risk anything further upon such purchases he might require the plaintiffs, his factors, to sell, but, if he failed to do that, he could not, by any declaration of his, limit his liability upon such contracts, unless you find, and can find, from the evidence, that there was not an agreement upon consideration made between the plaintiffs and defendant, by which defendant was to be released from such liability and the risk be borne by the plaintiffs in case they held the property longer and it was lost.

The defendant might also refrain from making any further purchases, but if he gave direction for other purchases to be made by plaintiffs on his behalf, as the evidence shows, and large ones, he would be entitled to any profits realized upon such purchases and would likewise be responsible for
the losses, if any were incurred, unless there was some contract by
124 which they were to be borne by the plaintiffs and the defendant re-
lieved from responsibility.

Also, if you should find that there was an agreement or understanding by which the defendant's liability was to be restricted to the amount of money advanced, it would be competent for him to waive that contract, to go on with the business and take further risks, and whether his subsequent acts and directions in regard to making purchases and sales, and holding stuff already bought for an advance in price, or by other conduct waived such an agreement, if so made, you are to determine, as you will determine any other fact, by a faithful consideration and weighing of all the testimony and circumstances in the case.

Gentlemen, the burden of this suit which has been submitted to you, and which the court desires you to determine, lies with the defendant. It is a defense which defendant sets up, and the burden of proving it to your satisfaction by the fair preponderance and weight of the testimony lies with him. If he has failed to do this, then the plaintiffs are entitled to recover the amount which they claim, with interest, there being no dispute either about the amount of money which the plaintiffs have paid, losses incurred for the defendant and the amount placed in their hands by the defendant, and no dispute about interest or the amount which they are entitled to receive. I say you should find it by a preponderance and weight of the evidence. I don't mean a preponderance in the number of witnesses. If that was the rule you should decide in favor of the plaintiffs, because they have two witnesses against one. The witnesses are all parties.

He (the defendant) testifies that he notified the plaintiffs on the
125 11th of March, 1879, that he would not put up any more margins,
would not invest a single dollar more, and would not be responsi-
ble for anything further.

He says that he notified one of the plaintiffs to that effect, and afterwards told the other plaintiff what he had told his partner. But the plaintiffs both deny this, and the question for you to determine upon that matter is whether he so notified them, and you will determine it from the preponderance in the weight of the testimony. There are two witnesses for the plaintiffs and one for the defendant upon the question, but the number of witnesses does not necessarily determine the question. You are to determine from the weight of the testimony, and if you think one witness is entitled to more credit than two you are at liberty to take his testimony, but the burden is upon the defendant, and he should satisfy you by a fair preponderance in the weight of the testimony that he notified them; and, as already told you, a mere notification of that kind would not have the effect to release him from responsibility already incurred through his contracts. Of course it would not be in his power to shift or vary his responsibility as to prior contract made by any declaration or act of his. But it is competent for the parties to enter into a contract by which the defendant should not be liable any further over and above the amount of money he had already put in, and the question is: Was there an express or implied contract to that effect?

The evidence shows that after the 11th of March there were large trans-
actions between the parties, running through March into the month
126 of April, five, six, or seven weeks after the time when he swears
this notification was made, and some of them he directed specially
when he was there upon the board, and some of them he directed by telegraph and by letter from home.

Now, it is for the jury to say, under all the circumstances, what the understanding was between the parties. It does not seem very probable that they would enter into an arrangement by which he should have the profits and they the losses. I hardly think the jury would be warranted in finding that such an agreement was made. It is clear that he directed in regard to selling and purchasing, and what the fact in regard to what the understanding was is for the jury to determine. It is for the jury to say from the evidence whether the defendant would be giving directions of that kind if they, the plaintiffs, were to hold the property for the purpose of making profits for him, being themselves responsible for the losses if any should be incurred.

The jury will take the case and give it a full and fair consideration, weighing all the evidence, and render such a verdict as shall be just under the law and the testimony.

Mr. Carter. I infer that the instruction I asked was refused from its not being given?

The Court. The instruction which you asked lacked one qualification, and I think I have given them generally to the jury in the charge.

(Following is the instruction asked by Mr. Carter, and refused.)

127 If you find that the defendant told the plaintiffs, or either of
them, on or about March 11, 1879, that he would not be responsible for any more money than they already had in their hands belonging to him; if you find further that at that time he had more money in their hands than sufficient to cover any losses he might then have incurred or was liable to incur if the transaction should then be closed out; if you should further find that it was then in the power of the plaintiffs to close out the transactions without loss to themselves or to him; if you should further find that after such notice the plaintiffs retained such money of the defendant's, and continued to do business for him, and charge up their commissions for such business to him against such moneys in their hands belonging to him, you will be at liberty to infer from such circumstances (if

you find them to have existed) an acceptance by them of the proposed terms of agency; and unless you find some act was thereafter done or said between the parties to change such relations between them, the defendant will not be responsible for any loss beyond such money then in their hands.

MEMBER OF JURY. I wish to enquire whether in case of the jury agreeing upon a verdict, that is, a general verdict, is it essential that they should be unanimous upon the questions?

The COURT. Yes, sir; they should be unanimous.

128 After further discussion by the court and the counsel, the following was added at the end of the second special question already given.

"If he did so notify them, or either of them, state, if you are able, if the amount of money then in their hands was sufficient to cover all losses he had then sustained."

Mr. COTHRAN. Just tell them how to answer the question.

The COURT. If you can answer that question, if you are able to state from the evidence whether he had money enough, why state whether it was or not. If you are not able to state you may so answer the question.

The foregoing are the whole of the instructions given by the court to the jury.

It is agreed by court and counsel that any papers in evidence may be given to the jury for assistance.

And thereupon the said defendant, by his counsel, then and there duly filed his exceptions in writing to the said charge of the court as follows, to wit:

"And now comes the said defendant by William E. Carter, his attorney, and excepts to so much of the instructions of the court given to the jury in this cause as follows, to wit:

"The court has already held that upon one of the issues made by the answer there is not evidence in the case on the part of the defendant from which the jury could find in his favor on that issue. The contracts are valid on their face, and there is no sufficient testimony in the case upon which the jury could find that there was any understanding between the parties to the contract, either between the plaintiffs and the persons with whom they contracted in Chicago, or between them and the defendant, or between the parties with whom they contracted and the defendant, other than appears on the face of the contracts. 129 The plaintiffs both swear that they had no other understanding, and that they each understood that both parties had the right to insist upon an actual delivery of the property in every case according to the terms of the contract. The defendant does not swear that he understood that there was to be no delivery, or that the contracts were to be settled by an adjustment and payment of the differences without delivery of the property, but says, in substance, that he had no understanding about it, and there is no testimony in the case to show that the other parties to the contracts in Chicago had any understanding that the contract was not to be performed according to its terms. There is nothing in the case, then, from which the jury would be authorized to find that the contracts were gambling contracts and void, but the jury should take the contracts as they appear upon their face, some of them being in writing and some not, but all alike in substance and form, and valid in law." (6th exception.)

The defendant, by his attorney, also excepts to so much of said instructions as follows, that is to say:

"There can be no question from the evidence that the contracts were entered into by the defendant through the plaintiffs, as his agents are brokers and members of the board of trade in Chicago, for the purpose of speculation, the object being to purchase wheat, oats, pork, corn, and
lard for future delivery, and to hold it for a rise in the mar-
130 ket. But such contracts are legitimate and valid. If the defend-
ant wished to take the risk of a rise or fall in the market upon these articles, there was nothing in the law to prevent his doing it, and the contracts which he made through the plaintiffs as his agents or brokers, whether for the purchase or sale of property, were binding upon him whether the speculations resulted in gain or loss. It might not be prudent for the defendant to enter into such a business, but it was neither unlawful nor immoral." (7th exception.)

And the defendant, in like manner, further excepted to so much of said instructions as follow':

"Unless the defendant has satisfied you of his defense in this behalf, and that there was some understanding or agreement by which the defendant's liability was to be restricted to the amount of money already advanced on each of the contracts, the plaintiffs will be entitled to recover the amount claimed." (8th exception)

And the said defendant, in like manner, further excepts to so much of said instructions as follows, that is to say:

"But if no such contract was made or understanding had, or if made it was waived, then, I think, the plaintiffs are entitled to *receive* the sum of $4,168.75, the amount which the evidence shows they paid for losses upon the contracts, with 1,243.75, the amount of commissions, making in all $5,412.50, with interest, which it is conceded amounts to $201.96 more, making $5,614.46." (9th exception.)

And the said defendant, in like manner, further excepts to so much of said instructions as follows, to wit:

"If he did not wish to risk anything further upon such pur-
131 chases, he might require the plaintiffs, his factors, to sell, but if
he failed to do that, he could not, by any declaration of his, limit his liability upon such contracts, unless you find, and can find, from the evidence, that there was not an agreement upon consideration made between the plaintiffs and the defendant, by which the defendant was to be released from such liability and the risk be borne by the plaintiffs in case they held the property longer and it was lost." (10th exception.)

And the said defendant, in like manner, further excepts to so much of said instructions as follows:

"The defendant might also refrain from making any further purchases, but if he gave directions for other purchases to be made by the plaintiffs on his behalf, as the evidence shows, and large ones, he would be entitled to any profits realized upon such purchases, and would likewise be responsible for the losses, if any were incurred, unless there was some contract by which they were to be borne by the plaintiffs and the defendant relieved from responsibility." (11th exception.)

And the defendant, in like manner, further excepts to so much of said instructions as follows:

"Also, if you should find that there was an agreement or understanding by which the defendant's liability was to be restricted to the amount of money advanced, it would be competent for him to waive that contract and go on with the business and take further risks, and whether his subsequent acts and directions in regard to making purchases and sales, and holding the stuff already bought for an advance in price, or by other 132 contracts waived such agreement; if so made, you are to determine, as you will determine any other fact, by a faithful consideration and weighing of all the testimony in the case." (12th exception.)

And the defendant, in like manner, further excepted to so much of said instruction as follows:

"If he has failed to do this, then the plaintiffs recover the amount which they claim, with interest." (13th exception.)

And the defendant, in like manner, further excepts to so much of said instructions as follows:

"As I have already told you, a mere notification of that kind would not have the effect to relieve him from responsibility already incurred through contract on his behalf. Of course it would not be in his power to vary or shift the responsibility by any declaration or act of his." (14th exception.)

And the said defendant, in like manner, further excepts to so much of said instructions, as follows, to wit:

"It is not seen that it would be very probable that they would enter into an arrangement by which he would have the profits and they have the losses; nothing probable that there should be such an arrangement as that, and I presume that the jury would hardly warrant it that such an agreement should be made as that. But it is clear that he directed in regard to purchasing and selling; what the effect of that is, it is for the jury to determine; for the jury to say whether it would be probable, whether he would be making directions of that kind if they were to hold the property for the purpose of making profits for him, they being responsible for the losses." (15th exception.)

133 And the said defendant, in like manner, further excepts to the refusal of the court to give in charge to said jury the following instructions, then and there asked by defendant's attorney:

"If the jury find that the defendant told the plaintiffs, or either of them, on or about March 11th, 1879, that he would not be responsible for any more money than they already had in their hands belonging to him; if you further find that at that time he had more money in their hands than sufficient to cover any losses he might then have incurred or was liable to incur, if the transactions should then be closed; and if you should further find that it was then in the power of the plaintiffs to close out the transactions without loss to themselves or him; if you should further find that after such notice the plaintiffs retained such moneys of the defendant and continued to do business for him, and charge up their commissions for such business against such moneys in their hands belonging to him, you will be at liberty to infer from such circumstances (if you find them to have existed) an acceptance by them of the proposed terms of agency; and unless you find that some act was thereafter done, or something said between the parties to change such relations between them, the defendant will not be responsible for any loss beyond such money then in their hands." (16th exception.)

And the defendant, in like manner, further excepts to the following addition by the court to the second special question submitted by the court to the jury:

134 "If he did so notify them, or either of them, state, if you are able, if the amount of money then in their hands was sufficient to cover all losses he had then sustained." (17th exception.)

And the defendant, in like manner, further excepts to the following instruction of said court to the jury, respecting the manner in which said jury were told to answer the said question:

"If you can answer that question, if you are able to state from the evidence whether he had money enough, why state whether it was or not. If you are not able to state, you may so answer the question." (18th exception.)

And the said jury returned into court their verdict in said cause, in favor of said plaintiffs; to which verdict of record in said cause reference is had.

And immediately upon the coming in of said verdict, the said defendant, by his said attorney, moved the court upon the minutes thereof to set aside the said verdict, and grant a new trial of said cause, for the reasons stated in the written motion therefor, to which motion reference is had; and thereupon the said court overruled and denied the said motion; to which ruling and decision of the said court the said defendant then and there duly excepted. (19th exception.)

And because none of the aforesaid evidence, rulings, or exceptions appear of record in said cause, the judge who tried the same has caused this bill of exceptions to be settled, and has hereto affixed his hand and seal, this 31st day of March, A. D. 1880.

R. BUNN, *Judge.*

135 And at the same term, to wit, on the 10th day of February, A. D. 1880, came the said defendant, by his attorney, and filed his petition for writ of error and assignment of errors, as follows:

Petition for writ and assignment of errors.

United States circuit court, western district of Wisconsin.

Ernest F. Smith and Milton C. Lightner,
plaintiffs,
vs.
John H. Rountree, defendant.

And now comes the said defendant, by William E. Carter, his attorney, and prays that a writ of error may issue to remove the said cause and the pleadings, evidence, and rulings of said circuit court, on the trial of the said cause therein, and the record and all the proceedings in the said cause in said circuit court, to the Supreme Court of the United States, to the end that said Supreme Court may examine the same, and correct any errors that may have intervened in the trial of said cause in said circuit court;

and the said defendant, by his said attorney, hereby states and charges that the said circuit court erred in the trial of said cause, in the following respects, that is to say:

First. Said court erred in admitting and allowing to go before the jury evidence offered by said plaintiffs, and objected to by said defendant.

Second. Said court further erred in rejecting evidence offered by said defendant.

Third. Said court further erred in withdrawing from the said jury and refusing to allow said jury to consider the defense set up by said 136 defendant in the answer herein, that the contracts upon which the said action was based were gaming contracts and illegal and void.

Fourth. The court further erred in holding and deciding that there was no evidence in said cause to impeach the legality of said contracts, and the said contracts were valid and binding.

Fifth. The court further erred in its instructions to the jury in said cause, which said instructions were duly excepted to by defendant's attorney.

Sixth. The court further erred in refusing to give to the jury the instructions asked by defendant's counsel.

Seventh. The court erred in overruling the motion made by the defendant for a new trial on the minutes of the court.

Eighth. The court erred in refusing to grant a new trial on the ground of surprise and newly-discovered evidence, as prayed in the motion of said defendant, based upon the affidavits read to the court on the hearing of such motion.

Ninth. The court further erred upon the said trial in other matters apparent on the face of the record.

Wherefore, by reason of the aforesaid errors, the defendant prays that the judgment of said circuit court may be wholly reversed, and a new trial thereof awarded.

WILLIAM E. CARTER,
Defendant's Attorney.

I certify that, in my opinion, the above assignment of errors is well founded.

WILLIAM E. CARTER,
Defendant's Attorney.

FEBRUARY 10TH, 1880.

137 And in the record of the proceedings aforesaid in said entitled cause, on the same day, viz, the 10th day of February, A. D. 1880, there appears the following entry, to wit:

On reading and filing the petition for writ of error filed by said defendant, it is ordered that said writ of error be, and is hereby, directed to be issued as prayed.

And came the said defendant, by his attorney, and filed his bond on appeal herein, as follows:

Bond on appeal.

United States circuit court, western district of Wisconsin.

ERNEST F. SMITH AND MILTON C. LIGHTNER,
plaintiffs,
vs.
JOHN H. ROUNTREE, DEFENDANT.

Know all men by these presents, that we, John H. Rountree, as principal, and Isaac Hodges and O. F. Griswold and Nathan W. Bass, as sureties, are held and firmly bound unto Ernest F. Smith and Milton C. Lightner, the plaintiffs above named, in the sum of ten thousand dollars, to be paid to the said Ernest F. Smith and Milton C. Lightner, their heirs, executors, or administrators, to which payment, well and truly to be made, we bind ourselves, and each of our heirs, executors, and administrators firmly by these presents. Sealed and dated this 2nd day of February, 1880.

Now, the consideration of this obligation is that, whereas said John
H. Rountree is about to sue out a writ of error to remove from the
138 circuit court of the United States for the western district of Wis-
consin to the Supreme Court of the United States the judgment,
evidence, record, rulings, and proceedings in the case of said Ernest F.
Smith and Milton C. Lightner vs. said John H. Rountree, in which case
judgment in favor of said plaintiffs and against said John H. Rountree
was ordered in said circuit court on the 13th day of December, 1879, for
$5,614.46 damages, and costs of suit:

Now, if the said John H. Rountree shall prosecute his said writ of error to effect, and if he shall fail to make his plea good, shall answer all damages and costs, including just damages for delay, then this obligation to be void; otherwise of full force and effect.

[SEAL.]
ISAAC HODGES. [SEAL.]
O. F. GRISWOLD. [SEAL.]
N. W. BASS. [SEAL.]

WESTERN DISTRICT OF WISCONSIN, *ss:*

Isaac Hodges and O. F. Griswold and N. W. Bass, being duly sworn, on his oath each for himself says: Said Isaac Hodges says he is worth the sum of ten thousand dollars; N. W. Bass says that he is worth the sum of ten thousand dollars, and said O. F. Griswold says that he is worth the sum of ten thousand dollars over and above all debts, liabilities, and exemptions.

ISAAC HODGES.
N. W. BASS.
O. F. GRISWOLD.

Sworn and subscribed before me this 29th day of March, 1880.

WILLIAM E. CARTER.
U. S. Cir. Court Com'r, West'n Dist. of Wis.

139 And the approval of said bond appears thereto as follows, to wit:

Approval.

United States circuit court, western district of Wisconsin.

ERNEST F. SMITH AND MILTON C. LIGHTNER, plaintiffs,
vs.
JOHN H. ROUNTREE, DEFENDANT.

On reading and filing the above and foregoing bond, it is ordered that the same be and is hereby approved, and that said bond upon being filed in said court operate as a supersedeas in this cause.

Given under my hand, at chambers, in the city of Madison, in the State of Wisconsin, this 31st day of March, 1880.

R. BUNN, *Judge.*

Certificate.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

I, F. M. Stewart, clerk of the circuit court of the United States for the western district of Wisconsin, hereby certify that I have compared the writings annexed to these certificate with their respective originals, and that they are true copies thereof and correct transcripts therefrom, 140 and of the whole thereof, now remaining of record and on file in my office, and also a true copy of the supersedeas bond on appeal, and assignment of errors in said cause, together with the original citation on writ of error therein.

In testimony whereof I have hereunto set my hand and duly affixed the seal of said court, at the city of Madison, in said district, this 15th day of May, A. D. 1880, and of our Independence the 104th year.

[SEAL.] F. M. STEWART,
Clerk Circuit Court, West. Dist. Wis.

141 Supreme Court of the United States.

THE UNITED STATES OF AMERICA, *ss:*

To Ernest F. Smith and Milton C. Lightner, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden in Washington on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the western district of Wisconsin, wherein John H. Rountree is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Madison, in said district, this 10th day of February, A. D. 1880.

R. BUNN, *Judge.*

Received a copy and service accepted May 24, 1880.

HIGGINS, FURBER & COTHRAN,
Att'ys for Def'ts in Error.

(Indorsement on cover:) No. 234. John H. Rountree, plaintiff in error, vs. Ernest F. Smith and Milton C. Lightner. W. Wisconsin C. C. U. S. Filed 29th June, 1880.

Supreme Court of U. States,

OFFICE SUPREME COURT U.S.
FILED
FEB 19 1883
JAMES H. McKENNEY, Clerk.

OCTOBER TERM, 1882.

108-269

JOHN H. ROUNTREE, Plaintiff in Error,

versus

ERNEST F. SMITH AND MILTON C. LIGHTNER, Defendants in Error.

Argument of Plaintiff in Error.

WILLIAM E. CARTER,
Attorney for Plaintiff in Error.

Witness Print, Platteville, Wis.

Supreme Court of the United States.

NO. 234.

JOHN H. ROUNTREE, Plaintiff in Error,

versus

ERNEST F SMITH and **MILTON C. LIGHTNER**,
Defendants in Error.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

BRIEF OF PLAINTIFF IN ERROR.

In this case the defendants in error, who were then brokers—so called—and members of the Board of Trade of the city of Chicago, in the State of Illinois, and partners doing business under the name and style of Smith & Lightner, sued the Plaintiff in error, whom I will in this argument, call the defendant, who was a farmer, and resided in Platteville, Grant County, Wisconsin, in said Western District, some two hundred miles from Chicago, upon an account for moneys alleged to have been paid, laid out and expended by them for him on or about April 29, 1879, at said city of Chicago, for his use and benefit, and at his request, and for moneys alleged to have been lent and advanced by them to him between that day and Februray 1st, 1879, and for work, labor and services alleged to have been performed by them for him between the same dates, amounting in all to $5,412 50-100 besides interest, which amount, it is alleged, he promised to pay to them, but had not done so, and the whole amount remained due and unpaid to them.

The second count charged that plaintiffs were commission merchants and engaged in the business of buying and selling grain, pork and lard, and doing a general commission business at said city of Chicago; that they were employed by defendant on or about February 2, 1879, to buy large quantities of grain, pork and lard for him at Chicago, and to make thereon certain advances for him, and they did so, and in consideration thereof he agreed to allow them certain reasonable commissions as compensation for the purchases and sales they made for him; that in pursuance of such employment, they bought for him between February 1, 1879, and April 29, 1879, 16,750 barrels of pork, 2,250 tierces of lard, 40,000 bushels of wheat, 20,000 bushels of oats, and 50,000 bushels of corn, and made advances thereon for him which advances amounted in all to $9,506.25, and that during that time they sold under and pursuant to his directions all of said pork, lard, wheat, oats and corn;

That their services in making such purchases and sales were reasonably worth $1,243.75;

That during that time he paid and was credited by them with $5,337.50; that all said transactions were closed by the sale of the last of said property April 29, 1879; that after deducting said payments from the sum of said commissions, services and advances there remained due from him to them $5,412.50, which remained unpaid and for which they demanded judgment.

The defendant for answer to the first count denied that he was indebted to the plaintiffs in the sum charged in the complaint, or in any sum whatever, for money laid out or expended, or services performed by them for him. He denied that they had performed any services or advanced or laid out any money to or for him for which he had not paid and fully satisfied them. And he denied that he had ever promised to pay them any of the sums of money set up in the first count or cause of action.

And as to the second count or cause of action, the answer set up that defendant admitted that in the month of February, 1879, he employed the plaintiffs to act for him as brokers at the city of Chicago, and to purchase for him with a large sum of money that he placed in their hands certain "options," as he was informed and believed they were called, that is to say, he was informed by them and believed, that wheat, corn, oats, pork and lard would almost certainly soon bear a higher price in the market than they then bore; that by making contracts in form agreeing to purchase such articles for future delivery he would without receiving, or handling, or actually purchasing, or paying for them, realize large profits from the difference between the price they bore in the market and the price they would probably bear at the end of the said time; that it would not be necessary, nor was it expected or understood that he or the plaintiffs as his brokers should ever actually see, touch, handle, pay for, or own, receive or possess any of said articles; that the large sums of money he placed in their hands, amounting to about $3,150.00, should be used to keep good the so-called margins upon such articles, that is to say, plaintiffs were to purchase said "options" in their own names, but they were to hold the same for his use and benefit. If the articles should rise in price the profits arising from such increase should be his, while if they should decline, the loss should be his;

That they should purchase such articles for future delivery to a nominal amount of many times the amount of money he placed in their hands; that they were to hold said moneys to protect them from loss in case of a depreciation in value of such articles, and such sum was adjudged and deemed by them sufficient for that purpose; that the whole of the $3,150 placed by him in their hands was so placed in their hands to be used, and was in fact used as he was informed for the purpose of making and keeping good the said margins; that he did not know whether the statement contained in the complaint of the articles said to have been bought by them for him was a true statement or not, and he therefore denied the same and demanded proof thereof.

He alleged that on March 11, 1879, when as he was informed and believed they had in their hands belonging to him more than enough money to pay all losses that had then been incurred on any purchases they had made for him, and to pay and satisfy, them for all services they had rendered for him, he gave them notice that he had no more money to put up or pay over for margins, and that he would not pay or advance another dollar, or invest, or be, or become liable for another dollar in or about the transactions or any of them; that all of said articles had been nominally bought and were carried in their names and it was within their power to close out and end said transactions at any time

He alleges that if they had closed out said transactions as they could have done, the alleged liabilities sued for would not have occurred. He further says that since said March 11, 1879, he had never promised to pay them anything whatever, or in any way admitted that he was entitled or was liable to them in any amount, but had always denied any such indebtedness or liability; that he did not know whether or not they then closed out all such transactions, and alleges that if they did not the loss was theirs and not his.

And for answer to both causes of action the defendant said, That all of the transactions between the plaintiffs and him, and all of the transactions out of which both of said alleged causes of action arose were gambling in the prices of the commodities purported to be bought by them on his account or behalf; that it was never intended or expected by him or them or the persons from whom they purported to buy the articles named in the complaint, that said articles or any part of them should be delivered by said seller to the plaintiffs or to the defendant; that the only contracts made between the plaintiffs and him, and between the plaintiffs and the sellers to them, as he was informed and believed, was, that in case of default in keeping margins good, and also at the time named for delivery of such articles, such contracts were to be settled and closed on the basis of the difference between the then market price of such articles, and the price which the buyer had agreed to pay for them; that if the current price at the time of settlement was higher than the price agreed to be paid, then the seller was to pay to the buyer a sum of money equal to such differences, while if the then current price was less, the buyer was to pay the seller a sum equal to such differences. That none of the parties to any of the contracts sued on ever performed, or expected, or intended to perform them or any of them, or to deliver or receive any of said articles, and if plaintiffs had paid or advanced for him any moneys, or had done or performed for him any services, which he denied, such moneys had been paid and advanced, and such services were done, in and about such gambling contracts, and the plaintiffs had no claim on him therefor. He further alleged that he had placed in their hands moneys belonging to him more than enough to pay them for all lawful services done and all moneys lawfully advanced by them for him, and was not indebted to them to any amount whatever. And he prayed judgment against them for the dismissal of the action and for his costs.

Upon the issues made by said complaint and answer, the parties went to trial before the Circuit Court, the Hon. R. Bunn, District Judge, presiding, and a jury, at the December special term of said Court, 1879.

The bill of exceptions is printed at length in the record, and is certified to contain all the evidence given on the trial of the cause. Such evidence was in substance as follows:

The plaintiff, Ernest F. Smith, was the first witness on the part of the plaintiffs. He testified that Rountree called on him at Chicago February 2, 1879, and told him to buy one thousand barrels of pork, and he did so. He said Rountree asked him what margin was necessary, and said he could supply it. He said he told Rountree that knowing him as he did (by reputation) they were not particular about margins, because they traded for gentlemen, who they knew would not try to stick them for their losses. But Rountree said he would send the margins. Only asked him half the ordinary margin, which is a dollar a barrel, only asked for half a dollar a barrel. Bought one thousand barrels pork for him February 2, and notified him of it by wire and letter. Witness then identified the telegrams and letters which passed between the parties while the transactions between them existed, found in the record, pages 12 to 36.

An extended examination of the correspondence will not be made, as it is believed that no part of it is material to the questions raised by the exceptions presented in this record. The substance of the letters and telegrams from the defendant to the plaintiffs will be found to be directions to purchase or sell, notifications of remittances, inquires as to the state of the markets, inquires as to the amount of pounds of lard or other products, in a tierce, keg or barrel, and how much cash it was necessary to pay down to make purchases, requests for advice how to make money, inquiries as to the plaintiff's charges for buying and selling, &c.; requests for them to do the best they could for him as he was distant from the market and had confidence in them, and notifications that he had no more money to invest. The first letter or telegram in evidence—it is fair to say—containing any reference to defendant's intention to invest no more money, is dated April 15th, 1879, and is found on p. 28 of the record. It may not be out of place to quote it here—

"I did hope that you had sold my lard, and sold short, as you had said; also wheat and part at least of the corn. Do the best you can, for I have no more money to put into it, which I told you before. I can't raise any more. I expect that all I put in, which was over $3,000.00, is gone. If you can save anything, do so, for me. Do the best you can, and keep me informed.

Yours truly,

JOHN H. ROUNTREE."

The plaintiff's reply to this letter will be found on p. 29, as it is quite long I will not reproduce it here, but refer to it as found there.

Another letter from defendant on the same subject, dated April 23, will be found on p. 30, and the reply of plaintiffs thereto will be found on p. 23, and another letter from them to him will be found on p. 33, erroneously dated there as of April 5th. Undoubtedly it should be April 25.

The only remark I care to make respecting those letters from the plaintiff at this time is, that in neither of them is there any denial of the explicit statement found in both the defendant's letters above referred to, that he had told them verbally, that he had no more money and could raise no more to invest in the deals.

On this subject I also refer to the defendant's letter to plaintiffs dated May 8, 1879, found on pages 35 and 36, and their reply thereto dated May 10, found on p. 36.

The letters and telegrams from plaintiffs to defendant, except those noted above, and hereafter, consist of notifications of purchases and sales, advices as to the state of the markets, opinions as to probability of rise or fall in prices, replies to inquiries from him as to how business is conducted (see letters from defendant, date 2, 9th, 1879. p. 14, and 2, 11th, 1879, p. 16, and reply of plaintiffs thereto, dated February 12, 1879, p. 16 and 17) advices of effort of Armour & Co. to break down provision markets, and that they had succeeded in "shaking out" a great many small operators, and were then trying "to cover some of their short pork," see letter of March 4, 1879, p. 23, directions to remit money for "margins;" notices that they had "changed" articles, as for instance, "April lard to May lard," letter of March 27, p. 24 and 25, advice to "sell short" to regain losses, letter of April 14, p. 28, and April 7, p. 29, statements of gains and losses, and demands for money.

The witness also produced and identified statements of account furnished to defendant from time to time, specimens of which will be found in the record on pages 37 to 40. Those printed in the record are samples of the whole, and it will be seen that they do not show that any part of the property alleged to have been bought or sold was ever delivered. Plaintiffs' letter of February 12, p. 16, shows what would be charged by them for buying "cash property," *i. e.* property delivered to the buyer or his broker, that is to say, interest on money advanced to pay for property, commissions, insurance and storage. The item of commissions is the only one of these, which figures in the accounts as presented to defendant, and this it is apparent does not depend upon the delivery or receipt of the property, but is earned by the broker, (as he claims) whether the property is received or not, every time he makes a so-called purchase, sale or "change," see account March 1, p. 38, and statement dated April 15, p. 38.

The witness further testified that defendant went to Chicago about February 24, and remained there several days. While he was there he went on the Board of Trade with witness, who made purchases for him while he was on the board, by his request or direction. About March 7, he was there again and remained some time. While there he was in in plaintiffs' place of business "all the while." Telegraphed him March 7th to send $3,000 additional margins. This dispatch was answered by his son, that defendant had gone to Chicago. When defendant reached Chicago markets had advanced so that the additional margins were not required and did not ask him for them. Mentioned the fact to him, that they had telegraphed him for margins, but the market having advanced they did not need them. During that visit to Chicago, also, he went on the Board of Trade with witness and his deals were called off in his presence. All purchases made for him while he was present were made by his directions. Prices current sent him contained not only a review of Chicago markets but of those of other cities. Plaintiffs' commissions were one-fourth of a cent a bushel on grain, five cents a barrel on pork, ten cents a tierce on lard. That was the customary price and they so informed defendant.

Witness produced the form of contract found on p. 41, and said some houses use contracts on the Board of Trade and some do not. The form produced, is the form used in all transactions whether signed or not. If the party wants them filled up they are filled up, otherwise they are understood as written.

When the market declined below the amount of margins in their hands, they were required to put up additional margins and keep them up until the contract was settled Had to put them up within an hour. The debit against defendant represented the moneys plaintiffs had paid out for him on the contracts made for him, plaintiffs' commissions and nothing else. Actually paid out for him that amount less $1,243.75 , plaintiffs' commissions on all the trades. Plaintiffs made the contracts in good faith and lived up to them. Under the rules of the Board of Trade if plaintiffs had failed to make the payments they would have been suspended or expelled, or both, from the Board of Taade.

The object of 'changing' was that if they had not "changed" April pork by the 1st day of April they would have had to receive the pork and pay cash for it. By 'changing' it they put off the delivery until the next month. This gave opportunity for the market to advance during that month. In contracts for April delivery, in case the articles purchased for April delivery were not sold before the last of April, they would have had to pay for them at the price at which they purchased them. The purchases were actual purchases of the article specified in the contract in each instance. All the contracts were made in the name of the plaintiffs. All dealings on the Board of Trade are done in the name of the commission merchant. That is the rule of the board. If plaintiffs bought anything for any month they expected it to be delivered, and there is no other understanding among commission merchants, but whatever they buy is to be delivered. That was the case in reference to all the purchases plaintiffs made for defendant. They had no understanding or agreement with him of any other character than that.

On Cross-examination he said, he had been a member of the board nearly two years. Was not certain of the number of members of the board. There were over a thousand. It required one hundred to make a quorum. The majority of them were brokers and commission merchants. Some members did no business (meaning on the board.) They can all transact business if they want to. Thought he had a conversation with defendant about what their commissions would be. Thought it was the first morning defendant came to his house. Could not say that he spoke to defendant about commissions, but he did about margins. Thought it was almost impossible that he should not have spoken to defendant about commissions but could not state the time—that he did so. Had talked with defendant about the usages and customs on the Board of Trade, but could not state when. When they had bought April pork for him he spoke to them about it. He did not want to "buck up" for it in April, and wanted to know if they could not put off the delivery and he have the benefit of the advance, and they advised him to "change" it to May delivery, and they did so, and he thought they also "changed" it to June so as not to be obliged to take it in. The difference between cash and time purchases is, that the price of wheat for the next month will be higher than cash wheat, because it will take that much to carry it. In one of their letters to defendant witness discussed the subject of how they could pay for property he might buy Speaking of the contents of that letter witness said, In case he wanted to carry that wheat when April came, we would take it in and pay for it. That—referring to the statements in the letter—is what it would cost him for carrying it for the month. It is not cash wheat at all; it is not delivered. It would not be cash wheat at all till he—witness—got it and paid for it. In answer to the questions put to him by defendant's counsel, whether there was any such transactions as was alluded to in that letter, *i. e.* "cash" wheat or other "cash" articles bought, witness said he could not say whether they bought April wheat at that time or not. He knew they did not take any wheat in on the first of April for him, but they might have bought some then. Did not know whether he bought April wheat or not.

In reply to the question, what was the difference between the kind of transaction referred to in that letter, and the ordinary transactions Plaintiffs had for defendant, he said, there was no difference at all." *Simply* if he intends to take *the wheat in and pay for it when the time has come around, and not change it, we must have sufficient notice so as to borrow the money.*"

To the question by defendant's Counsel:—

"Do the cases where you take the property and pay for it, bear the relation of one to one hundred to the cases where you do not?" He said, "They have a means of settling the trades same as between the clearing house and banks, which does away with a great deal of delivery, but if anything is bought for April, May or any other month, any amount of it, or all of it, can be delivered."

To the following questions put by the Court, "The party has a right to insist upon an actual delivery," he said:

"Yes, sir; and you have to receive it if the parties that sold it want you to do so. * * * * * On delivery day often 1,000 bushels of cash wheat will go round through a good many commission houses. You give me your check for $5,000, and the same $5,000 will go round town and settle up a great many contracts, just the same as one bank bill will pay a great many debts. $5,000 of warehouse receipts may close out a great many debts.

Question.—Do the settlements on the Board of Trade, where grain or produce of any kind is actually paid for, bear the proportion to those that are not, of one to one hundred?

Answer:—Well, every month all the grain that is in the city is delivered in order to save storage. It will go around.

Question:—Answer the question, yes, or no.

Answer:—I think there is probably more traded in there during the month than is delivered.

Question:—Well, is there not one hundred times more traded there than is delivered in the month?

Answer:—I could not say that.

Question:—Can you say that there is not?

Answer:—It is or is not, just as the brokers wish. If they wait for the grain they will get it.

Question:—Now is there not one hundred times more grain bought and sold than is actually delivered?

Answer.—I could not testify to that.

Question:—Is there not a thousand times more?

Answer:—It is very difficult to tell that. A great deal of wheat goes over for future delivery.

To the further question—whether there was not a thousand times as much grain bought and sold "on Change" in Chicago as was received, or shipped out of it, he said he could not testify as to that. And when asked if he would swear that there was not, he said he had never gone into the subject deep enough to testify. He could not affirm or deny it. He said however that he was inclined to doubt whether there was ten thousand times as much grain bought and sold in a year in Chicago as was shipped in there.

In reply to the question by defendant's counsel whether in any of the transactions for the defendant anything was delivered or paid for, and if so which it was, he said he could not tell which, but one lot of cash grain or cash lard was. Some of that grain, he said, came into the office.

Question:—And you charged it to him?

Answer:—He had nothing further to do with it; we paid up for it and—

Question:—I am asking you if you received from anybody or delivered to anybody, any articles you bought or sold for the defendants?

Answer:—I think probably we did. He might have bought this April pork and sold it. When the month came we might have delivered that out. I should hate to swear we did not handle any of it.

Question:—Did you receive as his, or deliver as his, any of these articles?

Answer:—That is a difficult question to answer. We have taken in pork or lard during that month—our books will show whether we have received these articles. I know from whom we bought these several articles. Our books disclose that we bought most of the provisions from Armour & Co. and it was delivered to us.

Question:—Was any of this property that you say you bought for the defendant ever received by you as his agents; he to be the owner and pay for it, or delivered by you for him , he to receive the purchase price? I dont ask you now whether at some time after he had been sold out, you got some of this property, but whether you received it as his, paid for it for him, or had anything to do with it as his, more than is indicated by these papers?

Now mark the answer of this intelligent witness to this—it seems to me—plain question.

Answer:—"If Mr. Rountree had April pork bought through us and had sold it before April came, and we had not made a trade for anybody else on our books, we would have received it and delivered it out; we would have given our check for a certain price and delivered it to another commission merchant and got his check. If we had got anything for Mr. Rountree that day we gave our check for it and got their check for it; we took in a large amount for different customers that came in there, and sold it out just as soon as it came in—coming in means between the hours of nine and half-past two. If you have anything for April, if anybody had the cash stuff they will bring it to you; they will bring the elevator receipts—that receipt is a receipt for property—they will deliver it to me and I have to receive it; that's what I mean by coming in, delivering—it is receiving."

He further said, "He," the defendant "had nothing more to do with it after he had sold it, but it could not be delivered till April. It was sold by him but not delivered; when the month of April comes in we send it out."

He further said, p. 77, speaking of the methods of settling deals on the Board of Trade, "It is never the case that all is settled You cannot always settle. A great majority are settled." "The difference is settled in the same way as the difference at the clearing house. One bank owes another $100,000, that owes a third $100,000, and the third owes the first $100,000, and it is settled and no money changes hands. But you cannot settle that way when it does not make a ring. If you have the stuff bought, of course, as we had in this case, you are very certain to get the stuff.

The witness after explaining, p 47, that by advising defendant to sell lard "short" in some one or more of his letters to him, he meant to advise him "to sell lard for June and take his chances for delivery. There would then be no trouble in getting all he wanted In other words it was this, I believed that the market price was going to continue to decline, and I believed there was money to sell lard for a month or more ahead, and he would make the money in the difference between what he bought it for and what he sold it for. That is what we call selling short. We advised him to do that. I think there was a loss in his doing it. It would have been wise if it had been done a little earlier."

In reply to the question by defendant's counsel, whether it was not a fact that ninety-nine one hundredths of the persons for whom plaintiffs did business on 'change, had no expectation of receiving any property they bought, but simply bought for the purpose of settling on differences, the witness said, "It is difficult to answer that question. We have large orders to buy from New York, and when it is due we ship it, and when we bought it we did not know it was to be shipped. I cannot say that, for the largest proportion of our customers buy and sell without intention to receive the property, but to settle gains and losses by the payment of differences."

Again in reply to the question whether he did not know that ninety-nine out of every hundred settle their differences instead of delivery and payment, he said, "The larger number are settled by the payment of differences."

To frequent repetitions of the same question in substance, he continued to reply, That a large number of them were settled that way, depending on the market.

To the question,

"Will you deny that ninety-nine one hundredths of them are settled that way?" he answered,

"I could not affirm or deny."

To the question,

"As to your own business, is it not true that ninety-nine out of every hundred of your customers settle in that way rather than by delivery?" he answered,

"A large number of those transactions are settled in that way, but many customers on our books settle by delivery. Our customers are in the east and we ship it to them."

To the question.

"Take the number of persons who deal with you, is not the statement true, that ninety-nine out of every hundred of them, taking the year round, actually do settle by the payment of differences, and in no other way?" he answered, "I could not state that. A large number are settled in that way, but a very large number of our customers will sell out their property and we take the stuff in on their purchases, and deliver it out on their sales.

Question.—"Will you deny that that proportion of your customers settle in that way?"

Answer.—"I say I can neither affirm nor deny."

Question.—"You have no opinion?"

Answer.—"I think a large amount of the trades are settled by the payment of differences."

He further said, p. 49, that it was within his own knowledge that his customers bought and sold, and plaintiffs bought and sold intending to settle by the payment of differences; that plaintiffs were to exercise their own judgment in this case.

In reply to the question,

"Now, according to your own knowledge, is it not the rule that your customers buy and sell intending to settle by the payment of differences. I don't ask as to your opinion. I ask as to your own intentions?" he answered,

"I can state that frequently we don't know who we are trading for, nor what their intentions are. We get orders from brokers to buy or sell, and their intentions we have no means of knowing."

Question.—"How did it happen in this case that all these deals, without a single exception, which were left to your own judgment, were settled in that way; when you were left with authority to buy or sell, as in this case, when in these deals you never received one pound or one bushel of anything you bought for defendant?"

Answer.—"I stated, I thought we had received grain and provisions on his contracts."

He was then requested to show by the books of his firm a single instance in which any of the transactions they claimed to have made for the defendant were settled otherwise than by a payment of the differences.

After the examination by him of the plaintiffs' books it was agreed that that question should be answered by his co-plaintiff.

He was then asked if, supposing there was a single case or more in which property was received on the defendant's deals it was not the rule that defendant's gains and losses were settled the other way? He said, "There is no rule at all."

To the question,

"Then in this case the practice was that you settled them in the other way, wasn't it?" he answered,

"There is no practice or rule."

Question.—"The practice in this case, I am not talking about the rules on 'change, I am talking about what you did in this case in settling for the defendant. Did you not settle the defendant's gains and losses by the payment of differences?"

Answer:—I can positively state that some were settled by the payment of differences and some by delivery."

He said he had not looked over the books far enough to see how many of them were settled by receiving the property, but by just looking at the books one second he could swear that some of them were.

He said he never had any instructions from the defendant as to how plaintiffs were to settle his differences, that they had orders to sell and buy, and what they did they did under the rules of the board of trade; they got orders from him to buy and sell. They got such orders from other people. He did not know that there was anything different in those from the orders of their usual customers. They had orders from him to buy and sell as is customary on the board of trade.

On his re-direct examination he said, "In dealing on the board of trade an order comes in to us to purchase. We have no means of knowing what the intention of the party is, whether he intends to receive the actual property, or wishes to have it held, or sell it at a margin. We act under instructions. We go and buy at the ordinary price, and with instructions to sell, we sell without limit. If there is a profit or loss it goes to the credit or debit of our customers. There is no understanding between brokers on the board that the article purchased is not to be delivered. There was not in any instance when purchases were made for Mr. Rountree any such understanding between us and the brokers The understanding was that when the time came, the stuff would have to be delivered. We remain liable on our contracts until after the actual delivery to the purchaser."

In re-cross examination—in reply to the question "Do you want this jury to understand that you actually receive all the goods you buy in that month," he answered

"We do if we hold it to the end of the month."

Question:—Don't you sometimes buy a great deal more stuff than there is in Chicago?"

Answer:—"We buy and sell a great deal of stuff in the month *and unless we get rid of it by some of those systems before the end of the month we have to receive it.*

Milton C. Lightner, the other plaintiff, testified in substance as the preceding witness, and in addition, he said, that some of the lard they bought for defendant came into their possession and he thought they had some of it then. There was no understanding between defendant and him that the articles bought were not to be delivered. "The subject was never in any way alluded to between him and me."

He said that when they bought the property they expected to receive it, if it were not sold in the meantime. On the 31st of March they bought 250 tierces of lard for defendant that was delivered to them May 1st, the day for which it was bought. They received the actual property. That was part of the money in controversy. That was one of the transactions for defendant. The money involved was probably about five thousand dollars. They did not receive all the property they bought for defendant, because they sold it under his discretionary orders, or his actual orders when he was present at the sale.

He said that defendant never objected to the amount of plaintiff's commissions, which he said were always stated in their accounts of purchases and sales.

Defendant's counsel then admitted that if plaintiffs were entitled to recover at all, the amount claimed was not disputed.

The witness further said that when defendant was in Chicago in March, they could, if so instructed, have sold all that he had on hand and made a profit for him. But they received no such instructions.

On cross-examination he said: "The lard purchased on March 31st was to change April lard to May lard. The lard sold short about the last of April. Was not sold in pursuance of special instructions, but was sold in pursuance of our general instructions—if we could save anything to do so. This was done in the exercise of our own judgment."

In answer to the question where, in the defendant's account was the charge for the lard said to have been received on his account, the witness said: (p. 53.)

"That does not go into the account at all. We were responsible as commission merchants, because we had already sold out the property before the actual stuff was delivered, although it was delivered on his contract. We received it as his agents, as his property. We sold it to a commission merchant on the board of trade and got his check for it, but we did not get the money for it that is in dispute now."

Question: "The defendant had nothing to do with it; you had sold it to somebody else and had got the pay for it at the time it was delivered?"

Answer: "Yes, sir."

Question: "In what way can it be claimed that the defendant had anything to do with that lard on the first day of May, if before that you had sold it and got the pay for it?"

Answer: "We would never have had that lard bought and sold if Mr. Rountree had not given the order; on his order we received it and delivered it. We bought part of that lard at 6.40 and part at 6.42½. Our accounts do not show to whom we sold it. We charged Mr. Rountree the difference between what we bought it for and what we sold it for, the difference between our checks. It was sold on the 15th day of April. We sold it on account of defendant, 16 days before it was delivered. We bought that lard as agents for defendant; at another day we sold it as his agents. We did not receive any margin when we sold it. We waived it voluntarily. I cannot say why. It was not defendant's fault. We had the absolute right to insist, before we made the trade, that the commission man should give us security for the payment of it."

For the remainder of the testimony of this witness on the subject of the alleged receipts by plaintiffs, on account of defendant of any part of the property alleged to have been bought by them for him, and the colloquies between him and members of the jury on that subject, I ask permission to refer to the record pages 54, 55, 56, and 57, as I cannot do justice to it by an abstract.

I will simply remark in passing, that this witness, who was to show which, if any, of the several articles said to have been bought or sold on the defendant's account, were delivered or received on his account, as distinguished from those settled by the payment of differences, notwithstanding the time spent in taking, and the pages of the record occupied in recording his testimony, failed to show a single instance where the defendant's deals were settled by delivery, or otherwise than by a payment of the differences by the losing to the winning party, or the charge of them on account by the latter against the former.

This witness, as well as Mr. Smith, his partner, knowing or believing it to be vital to their cause to show that the "deals" they claimed to have made on behalf of the defendant should bear the character of actual bona fide sales, consummated by actual delivery of the property, alleged to have been bought and sold, instead of transactions to be settled by a mere payment of differences, struggled hard to show that some one or more, at least, of the deals, said to have been made by them on defendant's behalf, was consummated by the actual receipt of the property on defendant's behalf, but he was at last compelled to admit that there was no such transaction; that so far as the defendant was concerned all trades or deals made by plaintiffs on his account were settled by the mere payment of differences and without the delivery of any of the property alleged to be bought or sold. He admitted further that the only instance in which any of the property alleged to have been bought by them on defendant's account was ever delivered to or received by them were the 250 tierces of lard said to have been bought March 31st. As to this it may be remarked that plaintiffs do not claim to be able to show to whom they sold it—a most remarkable statement if they did in fact sell it, it must be admitted, for business men to make—and 250 tierces of lard said to have been bought February 28, and delivered April 1st, fol. 98, p. 57. This 250 tierces they claim was sold on account of defendant March 27. After that he had nothing more to do with it, and if received at all, it was received as the property of some one else, and not as the property of the defendant, and his liability was at an end March 27. And another 250 tierces of lard said to have been bought for defendant February 28, and closed out as to defendant March 28 or 31, the witness' statement leaves it in doubt which. As to this lot whether received by plaintiffs on April 1st or not, defendant's liability had ceased either on March 28th or 31st. At any rate at the time when the property was received, if received at all by plaintiffs, it was not received as the property, or on account of defendant, but of some one else. And plaintiffs are unable to disclose, or at least do not disclose, on whose account it was received. But one thing is certain, none of it was received on account of defendant or while he was the owner of any contract for it, or while any contract respecting it was standing in his name or as his.

The witness said, p. 57, "Those"—correctly stated above as I believe—"are the only instances I have found where the property dealt in on Mr. Rountree's account was received by us on anybody's account or ever came into our hands."

The witness said in answer to the question, p. 55, "I ask if every one of defendant's contracts was not settled by the payment of differences?"

Answer.—"No, sir, by the actual delivery of the property."

Question.—"Every one of them?"

Answer: "No, sir, I won't say every one of them; I will say this one was," referring to the 250 tierces of lard said to have been bought on defendant's account March 31st, sold on his account April 15, after which he was not responsible, and received as the property of somebody else May 1st. He further said, (p. 56) He could not tell whether all the defendant's contracts were settled by charging up to him his losses, that he could only say some were and some were not, and this was his answer, after, by agreement, he was, by examining plaintiff's books, to determine just how defendant's contracts were settled—whether by delivery of the property on his account, or on payment of differences, or charging them to him merely. It will be observed that he promised to answer the question definitely after examining plaintiff's books, and if he found any instance where defendant's contracts were settled in any other way than by a payment of differences he would produce it. It will further be observed that he produced no such instance, and that none such was produced.

The witness further said, (p. 56) That he never received any instructions from defendant as to how his business should be conducted, or how his gains and losses should be settled. That defendant's gains and losses were settled according to the usual course of business, and that the manner in which they were settled was the mode prevailing on 'Change when the contracts were made. In reply to the question by defendant's counsel,

"I will now ask you as I asked Mr. Smith, if is it not a fact that 99 out of every 100 of these contracts are settled by payment of differences by the parties?"

He said:

"No, I do not know. I could not say that. I will not swear from my own experience that it is nct a fact or that it is. I will not swear that there is not 499 out of 500 trades made within my knowledge made by one (our) firm settled by a payment of differences."

On re-direct examination he said:

"Under these contracts in the purchases for Mr. Rountree, we remained liable on the contract until the contract was fulfilled. By fulfill I mean the delivery of the actual stuff, or settling the contract between the original seller and the last purchaser, whoever he may be. He can avoid the delivery by settlement between himself and the last purchaser, and he settles the contract. In that case there is no delivery; but for that the actual property is delivered, that is the actual dealing. I will not undertake to state the proportion of actual deliveries to the cases in which the contracts are settled in some of the ways I have explained. I wont undertake to deny that they are 500 to 1. I won't affirm or deny."

Ernest F. Smith recalled testified. * * * * *
"Unless a settlement takes place, the property is delivered in all cases. That is the universal rule."

On his re-cross examination he testified, "Ringing out is a slang phrase. Settlement is the term used. The manner of settlement is, the man originally selling, settles with the last purchaser. There may be half a dozen firms between them. We have among ourselves a clearing house like that among the banks. *So long as the original seller is not willing we cannot demand a settlement. If they are willing a settlement can be demanded. I cannot affirm or deny that 499 out of every 500 deals are settled without delivery in my own experience. As I have said before, a very large proportion of the trades are settled in that way.*

It was then stipulated that the Revised Statutes of Illinois of 1877 were in evidence and might be referred to by either party.

It had previously been agreed between counsel in open court that the rules of the Board of Trade of Chicago, as the same were in force at the time covered by the transactions involved in this case, were all in evidence, but I do not consider it necessary to quote them here.

The plaintiffs' testimony was then closed.

The defendant testified on his own behalf that he saw Mr. Smith about February 1st or 2nd, and asked him if he was dealing in what were called options. Told him he thought he would like to buy some pork, and asked how much margin he should have to put in, and Smith said about fifty cents a barrel. Told him to buy a thousand barrels and sent the margin from home. Did not see the letter or telegram from plaintiffs to him dated March 6, calling for margins. Went to Chicago that morning. Did not hear of the letter or telegram until about March 23. Saw both plaintiffs while in Chicago, Nothing was said by either of them that they wanted money or about his being required to put up any. On the morning of March 11 he told him (Smith) that he did not intend to put up a dollar more than the $3,150 he had then placed in their hands; that he would not be accountable or put up a dollar. Was in Chicago a good part of the time until about April 12th. He had just returned to Chicago from Milwaukee, and Mr. Lightner came to him at his son-in-law's house, and said he thought there would be about $500 short, and wanted him to make arrangements if he had not the money to let them have, to pay it before a great while. He then told Mr. Lightner he had no money, and had told his partner that he did not expect to put up any more. Lightner wanted to know if he could not borrow it, and he told him he could not, and they could not and need not depend upon him. That was all that had ever occurred between them relating to money or to the business besides what was contained in the documentary evidence. Never had any conversation with them about the delivery of any property they bought for him. Had no conversation with them respecting the manner in which the business was to be done, nor as to how his gains or losses were to be settled or adjusted except what is found in the correspondence. Was frequently on the Board of Trade with them. Could not say that they did or did not buy anything for him. Had no particular recollection as to how they bought or for whom. They never notified him that they had received or were liable to receive any of the goods. Knew nothing of the manner in which they bought or sold. They might have given him the prices they paid or agreed to pay. Had no recollection about it. Could not say that he had any understanding on the subject of the nature and character of Board of Trade deals, whether the property was to be actually delivered or whether it was to be settled for; nothing was ever delivered to him. He did not know anything about how those matters were settled on 'Change.

On cross-examination he said he had the talk with Mr. Smith about March 11th. Could not say whether he was on the board of trade with him on that day or not. Could not say whether he purchased 1,000 bushels of May oats in Chicago on March 7, or 750 on March 18. Very likely 700 barrels of pork and 1,750 barrels for June were purchased for him while he was on the board of trade on March 20. Bills were rendered; he had seen them. He said very likely they made other purchases and sales for him March 6th and 18th, for he thought he had four or five thousand dollars in their hands. He admitted that plaintiffs sent him a telegram (date not stated) as follows:

"May Pork, 10.20; wheat, 93."

And that in reply he telegraphed them on the 26th (month not stated but obviously March was meant,):

"It would be well to hold awhile."

He said he meant by that to leave it their discretion, and to give them his opinion that it was best to hold, and that by his telegram of March 29:

"Hold my stuff until the best price be got. Telegraph."

He meant that he wanted the best price that could be got for his "stuff." That they knew his instructions of March 11. He admitted that a reasonable construction of his telegram would include all the "stuff" as well that bought after, as before March 11. He meant that he wished them to do the best they could, but his opinion was to hold it.

He did not think he knew the name of any of the parties from whom plaintiffs purchased any of the property for him. Never talked with any of them, and never had any understanding with any of them, that he knew of. Got the statements of account from plaintiffs promptly, so far as he knew. Made no complaint on that account, or that they did not promptly advise him. Did not remember the purchases particularly; remembered that they purchased large amounts for him. Did not hear them sell any, and did not remember that he was present when they purchased it. They might have consulted with him about the purchases while he was there. They were acting as his agents, and he might have advised them in the purchases and sales they made for him. Could not say whether he did or not. He supposed he had a balance in their hands until Lightner went to him in April, and wanted him to arrange for $500. He had placed over $3,000 in their hands, and they had sold things to increase that balance to over $4,000, and he was afraid they would lose all that Very likely he wrote to them on March 22nd; complained of misfortune, the markets running against him, and that he did not know what to do. He was afraid it would absorb all the money he had put in. He did not think it had all been absorbed. He supposed they had money in their hands until they called on him for money in April, and asked them to buy or sell, thinking he had money in their hands. He felt that he was interested and had a right to control and advise. They bought for him, knowing how the account stood, and his views upon the subject. That he wanted to make a little money, and would not put up any more margins.

To rebut the defendant's testimony the plaintiff Smith said, that defendant did not, that he remembered, say to him on Mar. 11, what he said he did, and he thought defendant did not say so. The first intimation he had about defendant's not intending to stand the losses, was his letter of April 23rd. Made trades on the Board of Trade for defendant between March 7 and 22, when defendant was present and sitting by his side. When a trade was called out defendant understood it. That in the conversation with defendant he remarked about the $3,000, and defendant said he had heard nothing of it. Told him that it probably reached Platteville after he left there, and that the markets were then better. Defendant *said something about losing any more money, but nothing about selling. Did not want to lose any more money.* It was in reply to the information about the $3,000.

Lightner said in rebuttal, that defendant did not tell him on April 12 or at any other time, that he told Mr. Smith that he had no more money to put up and wanted it distinctly understood, that he would not be responsible for a dollar more. Could not recollect the conversation, the exact words. Told him he would owe us $500. He said he did not have any more money, cash money. Told him, of course he could get some. He did not want to do that. Defendant told him to carry the trades, and whatever plaintiffs did would be satisfactory. The first intimation he had that defendant had no more money, or did not intend to put up any more money, was his letter of April 23.

The defendant then testified that he did not say to Mr. Lightner that he wanted them to go on and carry the deals, and whatever they did would be all right. Did not say anything that he then or now considerered of that purport. Did not promise them at that time that he would repay any advances. Did not mean to do so and did not.

So much of the rules of the Board of Trade of Chicago as relates to the questions here involved, will be found on pages 65 and 66 of the record.

I have endeavored to set out in the foregoing pages, a fair abstract of all that is important in the testimony, and trust it will be found that I have done so.

I have deemed it necessary to set it out at much greater length than I should otherwise have done, because of the ruling of the trial court upon the testimony, and the exceptions thereto hereinafter stated.

At the conclusion of the testimony the defendant's counsel asked the court to direct the jury to find a special verdict in conformity with Section 2858 of the Revised Statutes of Wisconsin of 1878.

The court proceeded to frame questions to be submitted to the jury as required by that section.

The plaintiffs' counsel thereupon moved the court to withdraw from the jury all questions respecting the legality of the transactions between the plaintiffs and defendant.

This motion the court sustained, and ruled that there was no evidence in the case to impeach the legality of the contracts between plaintiffs and defendant, or of the transactions between them out of which the action had grown; that all of said contracts were fair and legal contracts, and not gambling or betting contracts, and that he would not submit to the jury the question of the legality of those contracts, or allow them to consider the same.

To which ruling the defendant duly excepted.

The court then framed and submitted to the jury the following questions:

First: Did the defendant notify the plaintiffs or either of them on or about March 11, 1879, that he would not be responsible for any money beyond the amounts of money they then had in their hands belonging to him?

Second: If he did so notify them or either of them, state, if you are able, whether the amount of money he then had in their hands, was sufficient to cover all losses he had then sustained.

Third: If you find that the defendant did so notify the plaintiffs as submitted in the first question, was there any mutual understanding or contract between the plaintiffs and defendant on or about the 11th of March, 1879, that the defendant should not be held liable on the contracts made on his behalf by the plaintiffs beyond the amount of money then already placed by the defendant in the plaintiffs' hands?

Fourth: If you find there was such a contract or understanding between the parties as is mentioned in the last question, did the defendant by his subsequent acts, declarations, directions, or conduct, waive the same and become liable for further losses incurred. over and above the money so placed in the plaintiffs' hands?

The defendant thereupon excepted to the form of the questions so submitted by the Court to the jury, and to the refusal of the Court to submit to the jury the legality of the transactions between plaintiffs and defendant.

The court then charged the jury. The charge given, as well as the instructions asked by defendant's counsel and refused by the court, are all preserved in the record, and will be found on pages 67, 68, 69 & 70. I will only give here, such parts of the instructions given, as were excepted to by defendant's attorney, and the requests for instructions made by him which were refused by the court, and to which refusal defendant excepted.

The first exception by defendant to the charge of the Court is to the following language, found on p. 67 : "The Court has already held, that upon one of the issues made by the answer there is not evidence in the case on the part of the defendant from which the jury could find in his favor on that issue. The contracts are valid on their face, and there is no sufficient testimony in the case upon which the jury could find that there was any understanding between the parties to the contract, either between the plaintiffs and the parties with whom they contracted in Chicago, or between them and the defendant, or between the parties with whom they contracted and the defendant, other than appears on the face of the contracts. The plaintiffs both swear that they had no other understanding, and that they each understood that both parties had the right to insist upon an actual delivery of the property in every case according to the terms of the contract. The defendant does not swear that he understood that there was to be no delivery, or that the contracts were to be settled by an adjustment and payment of the differences without the delivery of the property, but says in substance that he had no understanding about it, and there is no testimony in the case to show that the other parties to the contract in Chicago had any understanding that the contract was not to be performed according to its terms. There is nothing in the case, then, from which the jury would be authorized to find that the contracts were gambling contracts and void, but the jury should take the contracts as they appear upon their face, some of them being in writing and some not, but all alike in substance and form, and valid in law."

The next exception to the charge is to the following language, found on p. 67: "There can be no question from the evidence that the contracts were entered into by the defendant through the plaintiffs, as his agents or brokers, and members of the Board of Trade in Chicago for the purpose of speculation, the object being to purchase wheat, oats, pork, corn and lard for future delivery and to hold it for a rise in the market. But such contracts are legitimate and valid. If the defendant wished to take the risk of a rise or fall in the market upon these articles, there was nothing in the law to prevent his doing it, and the contracts which he made through the plaintiffs as his agents or brokers, whether for the purchase or sale of property, were binding upon him whether the speculations resulted in gain or loss. It might not be prudent for the defendant to enter into such a business, but it was neither unlawful nor immoral."

The next exception to the charge is to the following language, found on p. 68.

"Unless the defendant has satisfied you of his defence in this behalf, and that there was some understanding or agreement, by which the defendant's liability was to be restricted to the amount of money already advanced on each of the contracts, the plaintiff will be entitled to recover the amount claimed."

The next exception to the charge is to the following language, p. 68:

"But if no such contract was made or understanding had, or, if made, it was waived, then I think the plaintiffs are entitled to recover the sum of $4,168.75, the amount which the evidence shows they paid for losses upon the contracts, with $1,243.75, the amount of commissions, making in all $5,412.50, with interest, which it is conceded amounts to $201.96 more, making $5,614.46."

The next exception is to so much of the charge as follows, p. 69.

"If he did not wish to risk anything further upon such purchases, he might require the plaintiffs, his factors, to sell, but if he failed to do that he could not, by any declaration of his, limit his liability upon such contracts, unless you find, and can find, from the evidence, that there was not an agreement made upon consideration, made between the plaintiffs and defendant, by which the defendant was to be released from such liability and the risk be borne by the plaintiffs, in case they held the property longer and it was lost."

The defendant also excepted to the following part of the charge on p. 69:

"The defendant might also refrain from making any further purchases, but if he gave directions for other purchases to be made by the plaintiffs on his behalf, as the evidence shows, and large ones, he would be entitled to any profits realized upon such purchases, and would likewise be responsible for the losses, if any were incurred, unless there was some contract by which they were to be borne by the plaintiffs, and the defendant relieved from responsibility."

The next exception was to the following language on p. 69.

"Also if you should find that there was an agreement or understanding by which the defendant's liability was to be restricted to the amount of money advanced, it would be competent for him to waive that contract, to go on with the business and take further risks, and whether his subsequent acts and directions in regard to making purchases and sales, and holding stuff already bought for an advance in price, or by other conduct, waived such an agreement, if so made, you are to determine, as you determine any other facts, by a faithful consideration, and weighing of all the testimony and circumstances in the case."

The defendant also excepted to the following language on p 69:

"If he has failed to do this then the plaintiffs recover the amount which they claim with interest."

Also to so much of the charge on p. 70 as follows:

"And, as already told you, a mere notification of that kind would not have the effect to release him from responsibility already incurred through his contracts. Of course it would not be in his power to vary or shift the responsibility by any declaration or act of his."

Also, 15th exception, to so much of the charge as follows, p. 70:

"It does not seem very probable that they would enter into an arrangement by which he would have the profits and they the losses. I hardly think the jury would be warranted in finding that such an agreement was made. It is clear that he directed in regard to purchasing and selling, and what the facts in regard to what the understanding was, is for the jury to determine. It is for the jury to say, from the evidence, whether the defendant would be giving directions of that kind if they the plaintiffs were to hold the property for the purpose of making profits for him, being themselves responsible for the losses if any should be incurred."

Also 16th exception, to the refusal of the court to give to the jury the following instructions asked for by the defendant's counsel, p. 70:

"If you find that defendant told the plaintiffs, or either of them, on or about March 11, 1879, that he would not be responsible for any more money than they already had in their hands belonging to him; if you further find that at that time he had more money in their hands than sufficient to cover any losses he might then have incurred or was liable to incur if the transactions should then be closed; and if you should further find that it was then in the power of the plaintiffs to close out the transactions without loss to themselves or him; if you should further find, that after such notice the plaintiffs retained such moneys of the defendant and continued to do business for him, and charge up their commissions for such business against such moneys in their hands belonging to him; you will be at liberty to infer from such circumstances (if you find them to have existed) an acceptance by them of the proposed terms of agency; and unless you find that some act was thereafter done, or something said between the parties to change such relations between them, the defendant will not be responsible for any loss beyond such moneys then in their hands?"

The defendant also excepted, 17th exception, to the second special question submitted by the court to the jury, p 74:

"If he did so notify them or either of them, state, if you are able, if the amount of money then in their hands was sufficient to cover all losses he had then sustained?"

The defendant also excepted, 18th exception, to the following instruction by the court to the jury respecting the manner in which they should answer the question, p. 71:

"If you can answer that question, if you are able to state from the evidence whether he had money enough, why state whether it was or not If you are not able to state you may so answer the question."

The defendant also excepted, 19th exception, to the ruling of the court denying his motion for a new trial.

The first exception taken by defendant, found on p. 46, and the second, found on p. 48, and the third, on p. 50, will not be pressed.

ASSIGNMENT OF ERRORS.

The errors relied on, are those to which the remaining sixteen exceptions were taken.

For convenience and for brevity they will be arranged in four classes:

First: Errors in the form of special questions submitted to the jury, and in instructions respecting the manner of answering the same, exceptions Nos. 4, 5, 17 and 18.

Second: The rulings of the court respecting the notice given by defendant to plaintiffs on or about March 11, 1879, and the effect thereof, exceptions 8, 9, 10, 11, 12, 13, 14, 15, and 16.

Third: The ruling of the court that there was no evidence to impeach the legality of the transactions on which the action is based, and the refusal to submit any question respecting the same to the jury, exceptions 6 and 7.

Fourth: The denial of the motion for a new trial, exception 19.

ARGUMENT.

I.

The section of the Revised Statutes of Wisconsin, in force when this cause was tried, and upon which the first assignment of error is based, reads as follows:

"Section 2858: The court, in its discretion, may, and when either party, at or before the close of the testimony, and before any argument to the jury is made or waived, shall so request, the court shall direct the jury to find a special verdict. Such verdict shall be prepared by the court in the form of questions, in writing, relating only to material issues of fact and admitting a direct answer, to which the jury shall make answer in writing. The court may also direct the jury, if they render a general verdict, to find in writing upon any particular question of fact, to be stated as aforesaid. In every action for the recovery of money only, or specific real property, the jury may, in their discretion, when not otherwise directed by the court render a general or a special verdict."

So much of this section as absolutely requires the court to submit special questions to the jury when so requested in proper time, was first enacted in Wisconsin in 1874, and will be found as Sec. 1, Ch. 194, laws of 1874, and was amended by Ch. 21, laws of 1875. Before 1874 it was discretionary with the trial court to submit special questions to the jury or not. As this cause was tried after the revision of 1878 took effect, the statutes previously existing will not be quoted here, as they are not important, except so far as they furnish the foundation for the decisions of the State Supreme Court upon cases tried before November 1st, 1878, when the Revision took effect, see Sec 4978, R. S. of Wisconsin. It may, however, be stated generally, that the section of the Revised Statutes above quoted, embodies the substance of the acts of 1874 and 1875, so far as the peremptory command to the trial judges to submit special questions to juries, when so requested, is concerned.

This requirement of the statutes of Wisconsin has since its first adoption in 1874, and most frequently since the revision of 1878, been before the Supreme Court of the State for interpretation.

In Davis *vs.* Farmington, 42 Wis., on p. 431, the Supreme Court of Wisconsin, speaking by Lyon J., said: "Under our statutes, a party to an action tried by a jury, may have a special verdict as matter of right. Laws of 1874 ch. 21." "Such right is necessarily limited to material and controverted questions of fact; but within that limit it is absolute.". "The right to a special verdict is a most valuable one. By requiring the jury to pass separately and specifically upon each controverted question of fact material to the issue, a more careful and methodical consideration of the testimony by the jury may be secured, and the precise grounds upon which the judgment is based will be disclosed. These are important results, but they cannot be obtained unless the findings are full, explicit, consistent with each other, and free from evasion. In Haas *vs* Railway Co., the judgment was reversed because the special findings upon which it rested were in conflict. 41 Wis., 44. Nor can the want of these essential requisites be cured by a general verdict; for the party is entitled to a specific finding upon the very issue or proposition submitted, and cannot be turned away with the argument or inference that because there was a general verdict, the jury must have found that a particular fact was proved."

In Carrol *vs.* Bohan, 43 Wis., p. 219, the same court, speaking through its late distinguished Chief Justice, Ryan, said: "A special verdict was ordered, and the Court below submitted the matters in controversy to the jury, in the form of questions. One of these was, whether it was the understanding between the parties that the mortgage should cover the entire stock of goods in the respondent's store. The jury professed inability to answer this question as proposed, and asked permission to divide it. For reasons not apparent, the court indulged the jury in the rare luxury of dividing an indivisible question." "No judgment can rest upon such a verdict, and no court should receive it." "The statute providing for special verdicts is an excellent one; tending to dispel the occasional darkness visible of general verdicts. *But special verdicts are worse than useless, if courts do not submit for them single, direct and plain questions, and insist upon positive, direct and intelligible answers. Indirect, evasive, uncertain or unmeaning answers should never be received. And when none other can be drawn from a jury the verdict should not stand for a moment.* Citing Davis *vs.* Farmington, above cited. (The italics of course are mine.)

In Ward *vs.* Busack, 46 Wis., on p. 413, that court said: "A special verdict which disposes of all the litigated issues in an action is sufficient. What is admitted in the pleadings need not be found in the verdict."

In Urbanck *vs.* the C, M. & St. P. R'y Co., 47 Wis, p. 59, the court held, that to the question "Could the plaintiff have heard the whistle," etc., the answer "He might or might not," was not evasive, because it was manifestly impossible for the jury to give a direct and positive answer.

The most the jury could do would be to give their opinion, which was not asked. That it was not asking for a fact which could be the subject of a special finding. Exception to the question as asking for an impossible answer, would, the Court said, have been more tenable than an exception to the answer.

In Cotzhausen *vs.* Simon, 47 Wis., p. 103, the Court, after deciding —p. 105—that the first finding by the jury was uncertain and evasive of the real issue, because it left it uncertain whether certain representations charged in the complaint to have been made, were made or not, said, as to the second finding: "The facts embraced in this question are not found one way or the other, and they were very material to show whether the plaintiff knew, or had the present means of knowing, the truth or falsity of the representations, and whether he did or did not rely upon them," &c. And for these deficiencies and imperfections in the findings, the judgment of the trial court was reversed.

In Johnson *vs.* Ashland Lumber Co., 47 Wis., 326, the judgment of the trial court was reversed, because the special verdict left unanswered material questions—and no general verdict supplied the omission.

In Bankton *vs.* Sanger, 47 Wis., 500, the Court held, that because the bill of exceptions did not purport to contain all the evidence given on the trial, and in view of the instructions of the Court to the jury not excepted to by appellants, respecting the questions, the answers to which were complained of, the Court could not say that the answers were evasive or insufficient.

In Blesch *vs.* the C. & N. W. R'y. Co., 48 Wis., 168, the Court reversed a judgment in favor of the plaintiff, because of the substantial difference between the several answers made by the jury, to special questions put to them, in their several attempts to make their answers to such questions harmonize with each other, and said, p. 196: "The right to demand a special verdict of a jury is in many cases a valuable one; and when this right is properly limited to the ascertainment of such facts, and such alone, as are material to the parties, it cannot but aid in the attainment of just verdicts.

In Fick *vs.* Mulholland, 48 Wis. 311, the court reversed the judgment because the special findings by the jury were inconsistent and unsatisfactory.

In Schultz *vs.* the C., M, & St. P. Ry. Co., 48, Wis. 375, the judgment appealed from was affirmed, because defendant's counsel did not by his exceptions or otherwise, point out, that other questions than the one actually submitted to the jury by the trial court ought to be submitted. The court said, "The objection only informed the court that counsel thought the question submitted an improper one. No suggestion was made that counsel thought or desired that other questions should be submitted. All other issues were in fact submitted to the jury in the general charge, and we are unable to discover any erroneous statement of the law therein."

In Selleck *vs.* Griswold, 49, Wis. 59, the judgment was reversed, because the jury, in answer to questions submitted to them, after saying in answer to other questions, that Griswold, one of the defendants, by mistake, estimated timber not upon lands conveyed by plaintiffs to defendant, and that plaintiffs' agent was the cause of such false estimate, said, in answer to the question, in what way or manner and by what act or acts said agent caused such false estimates to be made, "we don't know." The testimony does not show by what word or act or in what manner the plaintiffs' agent caused Mr. Griswold to view the wrong land."

The court said those answers could not stand together. If the jury could say that plaintiffs' agent caused defendant to view the wrong land, "they ought to be able to point out some act or word, or some other thing in the conduct of such agent, which the evidence disclosed, and which induced them to find that he was in fault for the mistakes."

In Berg *vs.* the C., M. & St. P. R'y. Co., 50, Wis. 419, the court held that it is not error to refuse to submit to the jury any question that is established by undisputed evidence, nor to refuse to submit questions in the form asked by counsel, if the questions proposed were substantially submitted to and answered by the jury.

In Eberhardt *vs* Sanger, 51, Wis. 72, the court said, (1) "We are inclined to the opinion that the 'questions in writing relating only to material questions of fact' to be submitted to the jury under Sec. 2858, R. S., should be limited to the controverted facts put in issue by the pleadings, or such as might properly have been put in issue by the pleadings, but we withhold any decision on this point for the reasons stated, ("*i. e.* because it was not discussed by counsel, and was not strictly necessary to the decision of the cause, see p. 77.) (2) "Even if such is not the proper construction, yet the submission of thirty-seven questions to the jury in this case, only very few of which were put in issue by the pleadings, and most of which were mere items of evidence, and several of which were admitted, was error."

In Kelly, Adm'r., *vs.* the C., M. & St. P. R'y. Co. 53, Wis. 74, the court intimates grave doubts 'whether it is proper practice under the Wisconsin Statute above cited' when a special verdict is demanded, to take a general verdict on the whole case, but as the special findings showed that plaintiff was not entitled to recover, notwithstanding the general verdict in his favor, the special findings must prevail, and the judgment of the Circuit Court in favor of defendant' was affirmed.

In Fenelon *vs.* Butts, 53, Wis. 344, the court held, that it was not error to fail to direct a special verdict, when it was not asked for, and to ask for the submission of certain specified questions, and no others, was not asking for a special verdict under the statute.

In Ault *vs.* Wheeler & Wilson M'f'g. Co. 54, Wis. 300, the court held, that the defendant was not prejudiced by the general verdict taken by the court, in addition to the special verdict, there being no inconsistency between them, and the special questions covering the whole case.

In Jewell *vs.* the C., St. Paul & Minneapolis R'y. Co. 54, Wis. 610, the court re-affirmed the doctrine of Eberhardt *vs.* Sanger, 51, Wis. 72, and say p. 618, "In submitting special questions to the jury, each question submitted should be limited to a single, direct and material controverted issue of fact, and in such a way that the answer will necessarily be positive, direct and intelligible."

From the foregoing cases I think the following rules as to the construction of the statute in question may be deduced:

First. That a party to an action at law in Wisconsin, has an absolute right to a special verdict, if he asks for it in due time;

Second: That such request must be for a special verdict, and not for the submission of particular questions only;

Third: That each question submitted, should be limited to a single, direct and material controverted question of fact, arising upon the pleadings, or which might properly have been put in issue by the pleadings and must include all material controverted questions of fact in the case;

Fourth: That such questions must be so submitted that the answer to each of them will necessarily be positive, direct and intelligible;

Fifth: That such party has an absolute right to have a positive, direct and intelligible answer to each such question, consistent with each other answer, and free from evasion;

Sixth: That until such questions are so submitted and answered, no judgment can properly be pronounced, and if pronounced, cannot stand.

I suppose there can be no doubt the federal courts in Wisconsin are bound to follow in actions at law, the "practice, pleadings, and forms and modes of proceeding," "existing at the time in like causes in the courts of record of" that State.

17, U. S. Stat. 197, Sec. 914, U. S. Rev. Stat.

I suppose it to be also settled, that this court in interpreting a State Statute will adopt the construction given to it by the court of last resort of the State, if it has there received a construction.

Leffiingwell *vs.* Warren, 2 Black, 599.
Moores *vs.* National Bank, 104 U. S., 625.
20 Wall 137.
93 U. S. 674.
100 U. S. 47

This brings me to the question, Were the foregoing rules complied with, in the submission of this case to the jury.

There can be no question that the defendant asked the Court for a special verdict, in strict compliance with the statute, and the rules laid down by the State Supreme Court. The request, was for a special verdict and before any argument had been made or waived. See record, p. 66.

The questions submitted were not all of them limited to single, direct and material controverted questions of fact, and were not so submitted, as to compel positive, direct and intelligible answers to them. Nor were all the controverted questions of fact submitted.

To the form of the first question as it appears in the record, p. 10, and p. 66, there is no objection. It submits a single, direct and material controverted question of fact, admitting and requiring a positive, direct and intelligible answer. In other words a simple yes or no.

Nor is there any objection or exception to the answer. The jury met and discharged, the duty imposed upon them. They answered simply "Yes."

To the form of the second question as it is numbered and appears in the record, p. 10, and p. 66, there is the gravest objection as to form and substance.

It does not comply with the rules above pointed out. It is not submitted in such a way as to require a positive, direct and intelligible answer. It said to the jury in substance "this question is not material, and it makes no particular difference whether you answer it or not. If you can do so without putting yourselves to trouble you may. If not, you need not. Especially is that clear when read in connection with the instructions of the Court to them, as to how they might answer it, *i. e.*, "If you can answer that question, if you are able to state from the evidence whether he had money enough, why, state whether it was or not. If you are not able to state you may so answer the question." p. 71.

To this language of the Court to the jury, the defendant promptly and specifically excepted, p. 74, 18th exception, as well as to the form of the question. 4th exception, p. 67, 17th exception, p. 74. According to the rules above stated, the form of this question, the instructions of the Court to the jury as to the way in which they might answer it, and their actual answer to it, *viz.*: "We are unable to state," p. 10., are clearly fatal to the judgment. In the language of the late Chief Justice Ryan, in Carroll *vs.* Bohan, above cited: "The verdict should not stand for a moment."

The only escape from this result would be to show, that the matter to which the question relates was not a "material controverted fact, arising upon the pleadings, or which might properly have been put in issue by the pleadings."

To determine whether or not it was such a material controverted fact, it will be necessary to look again at the pleadings.

So far as the allegation in the first count, that the defendant on or about April 29, 1879, promised to pay the plaintiffs the losses they claimed to have sustained, and their commissions, is concerned, it is not sustained by a scintilla of evidence. There was no such promise or agreement. Both counts of the complaint, however, charge, in substance, that on or about Feb. 1st, 1879, at the special instance and request of defendant, or in pursuance or their employment by him, the plaintiffs performed certain services and laid out and expended certain moneys for him between Feb. 1st and April 29th, 1879, amounting to $5412.50, in and about the purchase and sale, of certain pork, grain and lard, made by them for him.

I will not again state the substance of the answer, but refer to it in the record, p. 6, 7, 8 & 9, and the abstract of it, previously made herein.

The complaint avers the alleged indebtedness to have accrued between February 1st and April 29th. The answer cuts this time into two parts, *i. e.* that between February 1st and March 11th, and that from the latter day to April 29. As to liabilities, if any incurred, between February 1st and March 11th, so far as the present point is concerned, the answer sets up no defense. But as respects any liabilities or losses alleged to have been incurred after March 11th, it sets up, that on that day he gave plaintiffs notice, that he would not thereafter be liable for losses beyond the amount of money he then had in their hands.

If in response to the first question the jury had answered that he did not give such notice, it would of course have been immaterial whether he had then any money in their hands or not, for the purposes of our present inquiry. But as the jury answered that he did, the next questions that arise are: had he the right to give such notice, and what was the effect of it? Clearly the answers to both, would depend upon the state of the accounts between the plaintiffs and him. If, at that time, he had incurred losses to an amount greater than the sum of his moneys in their hands, including the moneys he had sent them, as well as the gains, if any, he had made, it is clear, that if the transactions between them were such as the law permits, the notice could have no legal effect. That is, he could not by such notice relieve himself from any legal loss or liability, then incurred. While, if it was true, as defendant claimed, that plaintiffs had upwards of four thousand dollars of his moneys in their hands, over and above all losses or liabilities he had then incurred, it was equally clear that he might lawfully say to them, "Now, when my moneys in your hands are gone, that will be the end of my responsibility. I will not advance or be liable for anything more. Govern yourselves in your relations with me accordingly."

To make my meaning clear suppose that at the beginning of his relations with them, he had sent them the $3,150, and said to them then, "Now take this money, invest it in grain, pork and lard as you may see fit, in the absence of special directions from me, or as I may direct. Out of it and such profits as you make for me, pay yourselves for your commissions, and for any losses that may arise on account of any transactions you may make on my account. But understand, that beyond the amount I place in your hands, I will not be liable for any losses or commissions on any account whatever."

Can there be a doubt that if plaintiffs accepted the employment on those terms, they would be bound by the limitations?

To ask the question is to answer it, and it would be an idle parade to quote authority to sustain so plain a proposition.

Now if such results would follow giving such a notice at the beginning of the employment, why would not the same results follow giving it at any time during the continuance of it, as to the transactions to be thereafter had?

The only possible difference between giving the notice at the time of placing the money in plaintiffs' hands, at the beginning of the employment, and afterwards, is, that the notice could not have the effect of releasing the defendant from any loss or liability legally incurred by plaintiffs on his behalf, before it was given.

As to all losses or liabilities thereafter incurred, it would be equally effective, no matter when given.

If on March 11, 1879, when the notice to them was given, the plaintiffs had moneys of the defendant, over and above all losses they had then sustained, and liabilities they had then incurred on his account, if they did not choose to accept further employment from him on the terms stated in the notice, it was as much their duty to so notify him then, and decline to transact further business for him on the terms proposed, as it would have been, if the notice had accompanied the inception of the employment.

The effect of giving such notice, beyond question, was, so far as this branch of the defence is concerned, that plaintiffs had a right to be reimbursed out of the moneys in their hands for all losses they had then legally sustained and liabilities legally incurred on defendant's account, and for their commissions, if such moneys were sufficient for that purpose. If they were not they had a right to call on the defendant for any deficiency, if their losses and commissions arose out of lawful business transactions. While if such moneys were sufficient and more than sufficient for such reimbursement, any further business transactions between them as client and broker must be as much subject to the terms of the notice as though it had been given at the inception of the relations between hem. Absolutely controlled by the notice, in fact, unless some modification of its terms was agreed upon, then or afterwards.

The giving of the notice as claimed in the answer, being established by the jury, it is a verity in the case, and the plaintiffs to recover must establish either.

That when the notice was given the losses and commissions sued for had been incurred, or at least that defendant's moneys placed in their hands, and his profits, had been absorbed by losses and commissions so that he had none in their hands, or

That they refused to accept employment on the terms of the notice, and so notified him, or

That he subsequently released them from the obligations imposed upon them by the notice.

Now there is no pretense whatever that they refused to accept employment on the terms of the notice.

I think I shall be able to show ample reason why they did not.

The defendant claimed in his testimony, that when he gave them the notice on March 11, he thought he had "four or five thousand dollars in their hands," p. 60. A glance at their account sued on, p. 39, will show, I submit, that he was clearly right in so supposing, and that they had in fact considerable more than four thousand dollars in their hands, on March 11, 1879. It will be seen that the account, shows credits to him only, down to March 18; that down to that day his advances to them in cash, and profits gained, amounted to $4,637.50. A glance also, at their method of stating their accounts, shows that this amount was net, their commissions having in every intstance been deducted from the gains, or added to the losses, in each statement of account. (See specimen statement of account pages 37 and 38.)

That the first loss charged against him was on March 18, and that only $100, on 1,500 barrels pork, and that on March 21 they gave him

$300 in currency, which they would hardly have done had the balance of account been against him. And that to offset that loss, he is credited on March 20 with a gain of $243.75 on 2,750 barrels of pork, leaving in their hands March 20, 1879, $4,481 25, after deducting the $300, cash paid him, and the loss charged on March 18.

There is no doubt that defendant was in Chicago most of the time from about March 7, 1879, to about March 21, or 22. He says so, and so does the plaintiff, Ernest F. Smith, p. 64.

Mr. Lightner swears, p. 53, "When Mr. Rountree was in Chicago, in March, we could have sold out all that he had on hand, and made a profit for him, if he had so directed, but we received no such instructions.

Mr. Smith testified, p. 41, that plaintiffs' charges against defendant for commissions alone, from Feb. 1 to April 29 (less than three months, and most of the transactions in February and March) amounted to $1,243.75.

He further testified, p. 40, that although he telegraphed to defendant March 6, 1879, for $3,000 additional margins, yet when defendant reached Chicago on March 7, the markets had advanced and they did not need the margin.

A reference to the rules of the Board of Trade, p. 65, shows that plaintiffs had an absolute right to insist upon a margin of ten (10) per cent upon the contract price of the property bought or sold, being placed in their hands or in some designated bank, to protect them against loss, and that in the event of failure to put up such "margins," they had the absolute right to sell out the contract and prevent any further loss to themselves or their clients.

The situation then was this: Plaintiffs had, on March 11, in their hands a large sum of defendant's money, against which they were charging up large sums of money almost daily for commissions. They further had the right to close out all his contracts the moment his moneys in their hands were exhausted. If they chose to exercise the power granted them by the rules of their Board of Trade they ran no possible risk of loss on account of any of defendant's contracts. Whenever his margins were exhausted, they could close out his contracts. By continuing to act for him as his brokers they gained these commissions and ran no risk of loss, if they chose to assert their rights under the rules of the Board of Trade. If they did not get margins, it was because they voluntarily waived them. p. 55. By refusing to act for him on the terms proposed in the notice, they cut off the commissions which they were from day to day, charging up against his moneys.

Besides, as the correspondence shows, the purchases and sales were largely left to their judgment, and they believed, or professed in their statements to him to believe, that the purchases and sales made on his account would, after all, turn out all right. *And in the mean time, they went on charging up their commissions against him.*

If the markets should react, as they professed to believe they would, there was no risk of loss to the defendant or to them, even if they did not make him keep up margins, and the longer the markets took to react, the oftener the articles would have to be "changed," and the greater consequently would be their commissions.

I submit that there was ample reason why the plaintiffs should not terminate their relations to the defendant upon the receipt of the notice of March 11.

I submit also that the proof establishes, that on March 11, 1879, the plaintiffs had moneys belonging to defendant in their hands.

The question whether or not defendant waived, or released plaintiffs from the restraint of the notice of March 11, will more properly arise in the discussion of another branch of the case. I content myself for the present with saying, simply, that I do not think there is any evidence of such waiver, or release.

Whether there is or not, however, does not affect the question, I am now considering, *i. e.*, the materiality of the question, whether defendant had in plaintiffs' hands March 11, money enough to meet the losses he had then met with, added to plaintiffs' commissions.

I insist that the question was material, and that defendant had an absolute right to a direct, explicit and unequivocal answer to it. I insist further, that from plaintiffs own admissions on the stand, as well as from their accounts, the jury could have readily answered the question, if they had not practically been told by the Court that they need not, and that their answer must have been, that he had.

The question is, moreover, not only as to a material fact but it is directly in issue in the case. It is distinctly set up in the answer.

So much of the Wisconsin Statutes as relate to this question are as follows:

"(Sec. 2646) The complaint shall contain:

1. The title of the cause specifying the name of the court in which the action is brought, the name of the county specified by the plaintiff as the place of trial, and the names of the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts constituting the cause of action, without unnecessary repetition.

3. A demand of the judgment to which the plaintiff supposes himself entitled; if the recovery of money be demanded, the amount thereof shall be stated."

"Sec. 2655. The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint, controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief.

2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition."

It is only necessary for the plaintiff to reply to the answer when it contains a counterclaim —

"Sec. 2661. When the answer contains a counterclaim, the plaintiff may within twenty days, if he do not demur thereto, reply to the counterclaim." The remainder of the section relating to replies, I do not think it necessary to quote, as the answer in this case does not set up a counterclaim.

When no counterclaim is pleaded, new matter set up in the answer is deemed controverted without a reply, Section 2667.

"Section 2667. Every material allegation of the complaint not controverted by the answer, as hereinbefore prescribed, and every material allegation in a counterclaim not controverted by the reply, as hereinbefore prescribed, shall, for the purposes of the action, be taken as true. But the allegation of new matter in an answer not pleaded as a part of a counterclaim, or of new matter in a reply, is to be deemed controverted by the adverse party, as upon a direct denial, or avoidance, as the case may require."

"Section 2668. In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties."

The following are some of the decisions of the Wisconsin Supreme Court upon this subject:

Resch *vs.* Senn, 31 Wis. 138.
Somervail *vs.* Gillies, 31 Wis. 152.
Barker *vs.* Knickerbocker Life Ins. Co., 24 Wis. 630.
Merriam *vs.* Field, 24 Wis. 640.
Roys *vs.* Lull, 9 Wis. 324.
Wood *vs.* Lake, 13 Wis. 84.
Matteson *vs.* Ellsworth, 28 Wis. 254.
Gunn *vs* Madigan, 28 Wis. 158.
Morse *vs.* Gilman, 16 Wis. 531.
Wilson *vs.* Noonan, 27 Wis. 598.

I confidently submit to the court that for the reasons above stated, the second question was fatally defective.

Because of its defective form and substance. Because the court told the jury, in substance, that they need not answer it. And because the jury did not answer it, when they had the data before them to do so, the judgment cannot stand. Each defect is a fatal one.

The third question I am not quite able to understand. I do not know what the court meant, by asking the jury to say, if they found "that defendant did so notify the plaintiffs as submitted in the first question, was there any mutual understanding or contract between plaintiffs and defendant on or about the 11th of March, 1879, &c."

I should have supposed that when a client gave notice to his broker that he wanted his business done in a particular way, no matter what that way was, and the broker continued to act for his client, for reward, without protest against the terms of the direction or notice, that nothing further was needed, to make "a mutual understanding or contract" between the parties.

Especially should I suppose this to be so, when the broker at the time of receiving the notice or directions had in his hands a large sum of his client's money, which he continued to hold notwithstanding.

In fact I cannot bring myself to doubt that such is the law. There can be no doubt that it is.

The duty of the broker on receiving such notice was plain.

If he had no moneys in his hands belonging to his client, he could simply say, "I decline to accept employment on the terms proposed." If he did not do so, but continued to act as broker, charging his client for his services, how can he possibly be heard to say, that there was no "mutual understanding or contract" between them?

Suppose the client's declaration to be, that he would not thereafter pay more than—let us say, one-half of the usual commissions. Suppose the broker made no sign of dissent, but continued to act as broker. Could he afterwards be heard to say, that, notwithstanding his client's declaration there was no "mutual understanding or contract between them?"

Surely not.

How much more plainly would it be his duty to speak out promptly, if he was not willing to act for the client on the terms proposed, if at the time he had four or five thousand dollars of his client's money in his hands? Would it not under those circumstances be his plain duty to speak, promptly, and decline to act on the terms proposed? He should if not willing to act, at once close up his accounts with his client, and return to him the moneys in his hands.

In case he failed to do so. If on receipt of such notice he made no sign of dissent, but continued to act for the client and charge up against the client's moneys in his hands, his commissions for such services, can there be a doubt that such continuing to act, makes a "mutual understanding or contract between them? If not, I at least, am utterly at a loss to see why not.

That the notice was given to plaintiffs, the jury have established.

There is no claim or pretense that plaintiffs dissented from its terms, or refused to act as brokers for defendant in accordance with its limitations. The proof is clear that they continued nevertheless, to act for him without protest or objection.

In view of these circumstances, what could the jury understand that the court meant to ask by the third question?

They must have understood that in the mind of the court there was some mysterious meaning hidden in the words "mutual understanding or contract." They were asked to find whether the notice was given, and they found that it was. There was no doubt whatever, that, notwitstanding the giving of the notice, the relations between plaintiffs and defendant did not change. Notwithstanding the giving of it, they continued to absorb the defendant's money, just as before for their commissions to the amount of hundreds of dollars a month. As notwithstanding all this, they were asked further to say whether there was "any mutual understanding or contract between the plaintiffs and defendant," &c., how could they possibly help but suppose, that a continuance by the plaintiffs to act as defendant's brokers, and to charge him with their commissions, after receiving the notice, and without verbally or otherwise dissenting from its terms, did not constitute any "mutual understanding or agreement between them."

But on referring to the instructions the court gave them on this subject (p. 69,) it will be found, that the court really did entertain some sort of an idea, that it was not enough to constitute a "mutual understanding or contract" between plaintiffs and defendant, that the latter should prescribe to them the manner in which his business was to be done, and that thereafter they should continue to transact his business without dissent from his terms. For he said to the jury, "If he did not wish to risk any thing further upon such purchases he might require the plaintiffs, his factors, to sell, but, if he failed to do that, he could not, by any declaration of his, limit his liability upon such contracts, unless you find, and can find, from the evidence that there was (not) an agreement *upon consideration* made between plaintiffs and defendant by which defendant was to be released from such liability, and the risk be borne by the plaintiffs in case they held the property longer, and it was lost."

Now this may be clear, and it may be good law, but it does not impress me as either.

I only care, however, for the present to say, that in view of it the jury could come to but one conclusion, as to the third question, and that was, that something, some occult thing, called a consideration, was required to make a "mutual understanding or contract" which was not present in a simple direction how to do defendant's business, and a continuing to do it for reward without dissent from the terms of the direction, no matter how much of the defendant's money the plaintiffs then had in their hands, as compared with any liabilities they had then incurred on his account.

Unless there is some want implied in "a mutual understanding or contract," or "an agreement upon consideration" not supplied by directions from client to broker how his business must be transacted by them, if at all, and limitations fixed by him upon the liabilities he will incur in or about such business, and their retention of his moneys then in their hands and continuing to do business for him, for reward, and without dissent from his directions or limitations, the answer of the jury to the third question is in direct conflict with their answer to the first. Especially in view of the admission by Lightner above quoted that during the month of March the defendant's deals might have been closed out at a profit if they had had directions to do so. And in view of their own statement of account showing that on March 11 they had a large sum of defendant's money in their hands.

That there is such an unsupplied want I do not believe. If there is I will leave counsel on the other side to point it out. I submit that it does not exist.

Because of the inconsistency between the answers of the jury to the first and third questions, the judgment cannot stand.

The fourth question is surely not a compliance with the Statute above quoted or the rules established by the cases above cited.

It plainly does not submit to the jury a "single direct and material controverted question of fact," but instead, submits to the jury what is clearly a question of law.

What acts of the defendant would amount to a waiver of any rights he might otherwise claim under the notice of March 11th is beyond doubt a question of law for the Court.

Whether the defendant did those acts or any of them is a question of fact for the jury.

This question of fact, the defendant had an absolute right to have so submitted to the jury, that the answer must be "positive, direct and intelligible." See cases above cited.

The question was not so submitted. On the contrary, the question as submitted, and the answer of the jury taken together, resemble the answer of the jury in Selleck *vs.* Griswold, 49 Wis. 39.

The defendant has a right to have pointed out by the jury, what act or thing he has done since giving the notice, which is claimed as a waiver, in order that the Court may say as matter of law, whether the necessary effect of such act or thing was, to waive the effect of the notice.

As it is, the defendant, as well as this Court, is totally in the dark, as to what act or thing the jury found the defendant did which, as matter of law, justified them in saying that he had waived his rights under the notice of March 11th.

Because of the manifest failure to submit proper questions to the jury in this case, as required by the sections of the Revised Statutes of Wisconsin above cited; because of the failure of the jury to answer the questions actually submitted to them, in the manner required by law, and because of the inconsistency between the answers actually made by them to the questions submitted, I submit that the judgment of the Circuit Court must be reversed.

II.

The questions arising upon exceptions 8, 9, 10, 11, 12, 13, 14, 15 and 16 are very much the same as those discussed under the previous head

In so far as they are the same, it will of course be improper as well as unnecessary to repeat what has been said.

Fairly construed, I submit that the paragraphs of the instructions excepted to by the exceptions above enumerated, are to the following effect:

First. That the notice, which the jury found by their answer to the first question, the defendant gave the plaintiffs, March 11, 1879, even though the plaintiffs, notwithstanding the receipt of it, continued, for reward, to act as his brokers, lacked some element to make it a "mutual understanding or agreement."

Second. That even if such notice was given, and would be binding on the plaintiffs, if not waived by defendant, any subsequent interference by him with the business, such as instructions to buy or sell, or advice or directions to hold or not to hold the property, would amount to a waiver of the notice, and make the defendant liable for losses incurred, in the same way as if it had never been given.

The Court seems to have labored under the impression that the notice had not, could not have had, and was not intended to have had, relation to any contracts except those then existing, for he said: (p. 72) "Unless the defendant has satisfied you of his defense in this behalf, and that there was some understanding or agreement by which the defendant's liability was to be restricted to the *amount of money already advanced on each of the contracts, the plaintiffs will be entitled to recover the amount claimed.*"

This instruction implies a total misconception of the notice, and the evidence respecting it, and is at variance with the finding of the jury on that question.

Defendants' testimony contains no hint that his restriction of liability was limited to the contracts then existing. It was, on the contrary, a general restriction of liability. (ps. 58 and 59) And so the jury found. (p. 10.) The question asked them was general, "Did the defendant notify the plaintiffs," &c., "that he would not be responsible for any money beyond the amount of money they then had in their hands belonging to him?" There is no hint in this question that defendant's liability was restricted to any particular contracts. And the answer was as general as the question. The jury said he did give such notice.

I wish to say here that Mr. Ernest F. Smith practically admits having received such notice, for he says, (p. 64) "Mr. Rountree said something about losing any more money, but nothing about selling. Did not want to lose any more money. It was in reply to the information about the $2,000.00."

In view of this broad finding of the jury, there is no ground for claiming that the notice was restricted to contracts then existing, and consequently the instruction of the Court above quoted, to which the 8th exception was taken, is manifest error, which must work a reversal of the judgment.

That part of the instruction, to which the 9th exception was taken, is obnoxious to the same criticism.

Again, the Court told the jury, by the language to which the 10th exception is taken, (see pps. 69 and 72) that defendant "might require the plaintiffs, his factors, to sell, but if he failed to do that, he could not, by any declaration of his, limit his liability upon such contracts," &c.

Is this the law, even as to contracts then existing? Is it true that his only way to relieve himself from further liability upon contracts then made was to order in terms, his factors to sell? The contracts were made in their names, not in his. He was not known in the transactions, even to the brokers from whom plaintiffs bought, if they did buy, or to whom they sold, if they did sell. (Testimony of Smith, p. 50.)

Plaintiffs had absolute power to sell or not sell, to hold or not hold the property, subject only to their liability to him.

When he gave them the notice that he would not be responsible for losses beyond the amount of his moneys then in their hands, in what respect did that differ from an order to them to sell, if to keep his losses within that limit it was necessary to sell?

According to their claim, they had bought and were carrying in their own names, as purchasers, certain property for him as his agents. Suppose that on March 11 they had incurred by so doing certain losses. Suppose those losses to be then less than the amount of his moneys in their hands. Suppose that on that day he said to them, "Now you must in any event limit my losses to the amount of money you have in your hands, I will not be responsible for a dollar beyond that." Can there be a doubt that he could lawfully do so, and that if he did, the plaintiffs must keep his losses within that limit if within their power to do so?

Can there be a doubt that such an order would to all intents and purposes be an order to sell, if to keep his losses within the prescribed limit a sale was necessary. Or to put it another way. If by selling they could keep his losses within the prescribed limit, was it not their duty to do so?

Would not such an order therefore be equivalent to an order to sell?

The court in effect, charged the jury, by the language excepted to by the 10th exception, that the notice they found defendant gave plaintiffs, was not equivalent to an order to sell. That without such order to sell, he could not relieve himself from liability upon his contracts, and therefore plaintiffs must recover, unless the jury found that there was "an agreement upon consideration," by which the defendant was to be released from liability, &c.

This instruction it is submitted, was error.

By the language excepted to by the 11th and 12th exceptions, the court charged the jury in effect, that if defendant after giving the notice of March 12, gave directions for other purchases, it would be, as to such purchases, at least, a waiver of the notice of March 11th.

If that was not what the court meant the jury to understand, his language had no meaning.

This was undoubtedly what he did mean the jury to understand, and I submit that in this the court certainly erred.

Can it be doubted that defendant might after giving the notice, direct the plaintiffs to buy or sell? And can it be doubted that if they did so without dissenting from the terms of his instructions to them, he would have the right to suppose they were acting in pursuance of the terms of his notice? As said above, they could at any time refuse to act for him, to buy, sell or hold, on the terms proposed. If they did, and he then gave them instructions to buy, sell or hold notwithstanding, that would undoubtedly amount in law to a waiver of the terms of his instructions. But until they did so notify him, or take some step to indicate their dissatisfaction with his proposed terms of employment, the law will hold them bound by the terms of his instructions.

The request for instructions made by defendant's counsel (p. 70 and 73) presents, in a very mild form, the rights to which the defendant was entitled by virtue of his notice, directions or instructions to plaintiffs, of March 11, no refusal of the plaintiffs to act for him in pursuance of them being made to appear.

This instruction should, I submit, have been given. And the refusal to do so was error, fatal to the judgment.

"The primary obligation of an agent, whose authority is limited by instructions, is to adhere faithfully to his instructions."

Dunlaps' Paley, on agency, (p. 3) and case there cited.
Brown *vs.* McGran 14 Peters 479.

The Supreme Court of Wisconsin in Hall *vs.* Storrs, 7 Wis. 253, said, "We do not understand the general proposition to be controverted, that it is the first duty of an agent or factor whose authority is limited by instructions, to adhere faithfully to those instructions in all cases to which they properly apply. The express orders of the principal, when they are clear, possible and proper, bear no discretion with the agent, but are absolutely imperative upon him."

In this case the instructions from defendant were clear—That he would in no event be responsible for any more money than they then had in their hands.

They were possible, because plaintiffs had then and would have thereafter while they acted for defendant, the title to all property bought by them for him in their own names, and had the absolute right to dispose of all of it, when the defendant's money was exhausted.

They were certainly proper—if the transactions in which the parties were engaged were themselves proper. The defendant had an undeniable right to limit his liability to loss to a certain amount. There was certainly no impropriety in that. And if the plaintiffs chose to accept employment on those terms, no legal principle is violated. They might lawfully do so if they saw fit.

There is no difference between stock or other brokers, and other agents, respecting their duty to obey the orders of their principals.

Dos Passos on Stock Brokers, 118, 120, 164, 166, 167, 168, 182, 226, and 227.

I wish also at this time to ask the attention of the court to that part of the instructions to which exception No. 15 was taken, which will be found on p. 70. "It does not seem very probable that they would enter into an arrangement by which he should have the profits and they the losses. *I hardly think the jury would be warranted in finding that such an agreement was made,"* &c.

This language, and the remainder of that used in connection with it, and included in the above named exception, which I will not repeat here, shows, that the court totally misapprehended the relations between the parties.

For as shown above, defendant's moneys in plaintiffs' hands, were more than sufficient to pay any losses he had then met with. There could be no losses beyond that limit, if they chose to exercise their undoubted right to close out the deals he then had, as well as those he might thereafter have, when his moneys in their hands were exhausted. And under the instructions which the jury found he gave them, it was clearly their duty to do so.

If for any reason, they saw fit to carry his deals longer, he had the right to suppose, in the absence of notice to the contrary, that they were carrying them in pursuance of his instructions. And this the law will compel them to do.

The language there excepted to, however, simply repeats the error in the language excepted to by exception No. 10, and emphasizes the opinion evidently entertained by the Court, and given again and again to the jury in substance; that giving the notice or instructions of March 11, without dissent by plaintiffs from its restrictions, and their continuing thereafter to act for him without such dissent, did not amount to a mutual understanding or agreement between them.

It served to place before the jury in about as plain a manner as it was possible to do, that such was the opinion of the Court, and that for want of such agreement the defense must fail. The Court, I most respectfully submit, went out of his way to argue the cause for the plaintiffs, when he said to the jury that it did "not seem very probable that they would enter into an arrangement by which he should have the profits and they the losses. I hardly think the jury would be warranted in finding that such an arrangement was made."

Why is not this language equivalent to directing the jury to find for the plaintiffs? The jury must have so understood it.

No one asked the plaintiffs to undertake any arrangement by which they were to pay or have any losses. The instructions given them were in effect, that there should be no losses beyond the money they then had, and if they had obeyed them, the defendant's money in their hands would have been lost, and that would have been the end of losses by either him or them.

This is what they were told to do. If they did not do it for any reason, can they escape the consequences by saying they did not undertake to pay any of defendant's losses?

Was it fair for the Court to put the question to the jury as he did, in such a way as to imply that the position of the defendant involved the making of a contract by the plaintiffs in terms, and for a consideration, to pay his losses?

There was no such agreement made. The defendant never claimed that any such was made.

On the contrary, his position was, that in consequence of the disobedience by plaintiffs of his instructions, to confine his losses to the amount of his money in their hands, for losses, if any, beyond that, incurred by such disobedience, they could not call upon him to reimburse them. An entirely different thing from an agreement by plaintiffs to pay his losses.

This position, was pointedly negatived by the Court in the instructions given, which were excepted to, as well as by the refusal to give that asked by the defendant.

Under the instructions given, the jury could not answer the third question, otherwise than in the negative.

Respecting the instructions given and excepted to, as to the alleged waiver of the contract or notice of March 11, I do not care to enlarge upon what I have already said.

I have already pointed out, that in my opinion it could not be a waiver that he should give plaintiffs orders or directions after that, and have stated my reasons for thinking so.

I insist that the rulings of the court on that subject were based upon a misconception, both of the facts, as to the terms of the notice or directions of March 11, 1879, and of the law.

I submit that such error pointed out, and the others above specified were prejudicial to the defendant, and therefore the judgment cannot stand.

III.

I now come to the consideration of the question, whether the court was right, in deciding that there was no evidence at all, to impeach the legality of the transactions in which plaintiffs and defendant were engaged, and refusing to permit the jury to pass upon that question.

I may perhaps be permitted to recapitulate briefly here, what the evidence actually was, on the subject.

The plaintiffs were brokers or commission men, members of the Board of Trade of Chicago. The defendant was a farmer, residing in Wisconsin, some 200 miles distant from Chicago. The plaintiffs claim that, as his brokers, and, in pursuance of his instructions, they bought from time to time in their own names, from other brokers or commission men, large quantities of pork, lard, wheat, oats, and corn for him.

None of this property was delivered to or received by them for the defendant. Nor did they ever deliver any of the property they claimed to have sold for him, but all his gains and losses were settled by the payment of differences.

It is true, that the plaintiffs both struggled hard to maintain their statements, made originally by both of them, that some part of the property was received by them for defendant, while admitting that most of the transactions were settled by the payment of differences. Yet, on being challenged, to show by their books a single instance, where property was received for the defendant or on his account, they were compelled to admit that they could find no such instance. See, on p. 57, final testimony on that subject, of Mr. Lightner, who was to answer that question after examining their books, given after such examination.

Their statement of account shows, on pages 39 and 40, that they claimed to have bought, sold and 'changed' for him :

17,500 barrels of pork,
2,250 tierces of lard,
110,000 bushels of grain.

The final examination of the plaintiffs' books made by Mr. Lightner shows, as stated by him (p. 57) not only, that no part of it, not a pound or a bushel of anything, was received for Mr. Rountree, or by them as his agents, but that not a bushel of the grain, or a barrel of the pork was ever received or delivered by them on account of anybody, or ever came into their hands at all, so far as he could find.

That the only part of this mass of produce, they even claim to have received, was, as shown above, some of the lard, and none even of that on account of defendant.

The result then, is, that all of the defendant's transactions, purchases or sales, were settled by the payment of differences, and none of them by delivery.

The defendant gave the plaintiffs no instructions whatever, as to how his gains and losses were to be settled. And they were settled in pursuance of the custom, generally pursued by plaintiffs in their business, and the mode prevailing on 'change at that time (p. 56.) They would neither of them deny that within their own experience, and in their own business ninety-nine one-hundredths of all transactions on the Board of Trade were settled, simply by the payment of differences. They would not deny, that upon the Board of Trade in Chicago, a thousand times as many transactions were settled by the payment of differences, as by the delivery of the property, but they were inclined to doubt if ten thousand times as many transactions were settled by the payment of differences, as by delivery, and that is the only statement in the form of a denial, they would make, on that subject.

By their letter of February 12, 1879, p. 16, in reply to defendant's letter to them, dated 2, 9, 1879, p. 14, it is perfectly plain, that they understood all through their transactions for defendant, that they were not buying cash property, or property that they expected would be delivered, let them say on the stand what they might. In that letter, they point out what they should and should not require of defendant, in the event of his desiring to deal in "cash property." None of the items incident to deals in cash property, as distinguished from their actual transactions, appear in any of their statements of accounts, whether dated before, or after February 12. Nothing is charged for "carrying" any of the property. No interest. No insurance, and no storage.

The reason is simple. There was no cash property. No property delivered or received, and none bought or sold on defendant's account, for delivery.

All purchases and sales on the Board of Trade are made in the name of the broker. The name of the principal is not disclosed (p. 50.)

Indeed the name of the principal is "jealously concealed." Dos Passos on Stock Brokers, p. 106.

It is safe to say, that the broker, who should disclose the name of the person for whom he is buying or selling, would not long have a client to betray.

The broker knows and cares to know, no party to the transaction but the other broker. From him he buys, to him he sells, and with him he settles, generally by the payment of differences, so far as the Chicago Board of Trade is concerned, as the proof in this case shows, and always, so far as the transactions involved in this case are concerned, as shown above.

The question now presented is, I believe, new in this court. But it is not new in the courts of many of the States, and has also been considered by the Circuit Courts of the United States, on several occasions.

Some of the cases in which it has arisen will be found cited below.

The decisions, while not entirely uniform, are practically so. There being but a very few cases out of the general current of authority.

The question is one of great importance, and far reaching in its consequences; as if this court should concur with the decision of the court below in this case, it would be taken as legitimating a class of dealings, which are held by the courts of last resort in most, if not all, of the States where it has been considered, to be a mode of gaming most demoralizing in in its tendency and destructive of the public good. The more demoralizing and destructive, because, it puts on the dress of legitimate business, the more effectually to lure in the victims, upon whose folly these brokers fatten.

The courts of Illinois, in which State the transactions in question occurred, and by the laws of which their legality must be determined, have, as will be shown below, emphatically pronounced against them.

Judge Love, U. S. District Judge for the District of Iowa, sitting as the Circuit Court in that District, in Melchert *vs.* the American Union Telegraph Company, decided at the January term, 1882, reported in Vol. 11, Federal Reporter, p. 193, says of these transactions, made to be settled by the payment of "differences," what I cannot do better than quote, "Such a dealing amounts to a mere speculation on the rise and fall of prices. It required no capital except the small sums demanded to put up as margins and pay differences. It promotes no legitimate trade, any impecunious gambler can engage in it with infinite detriment to the *bona fide* dealer. It enables mere adventurers, at a small risk, to agitate the markets, stimulate and depress prices and bring down financial ruin upon the heads of the unwary. It enables the unscrupulous speculator, with little or no capital, to oppress and ruin the honest and legitimate trader. Corners and black Fridays and sudden fluctuations in values, are its illegitimate progeny."

In Dos Passos on Stock brokers, it is said (p. 409) * * * * "it may be said that the general tendency of the courts of the various States is to consider all gaming and wagering contracts as utterly void; to look upon them as insidious enemies to our modern public policy and standard of morality, fostering unhealthly desires for sudden gains, destroying the spirit of patient labor, and presenting easy avenues to demoralizing habits of speculation—often to positive crime."

On p. 410 the same writer says, "In the outset the general proposition upon the subject of wagers may be stated as follows: If the agreement between the parties is a *bona fide* contract to buy and sell, the law will sustain it; but where it appears from the evidence, that there is no real contract of sale, and that the whole arrangement is to be settled by the payment of differences, it will be set aside. This statement is conceded in all of the cases; and whatever inconsistency or want of harmony there may be in the decisions, will be found to arise from the different interpretations the courts have placed upon the facts, and which can only be ascertained by a review of the adjudications."

In "The Law of Stock Brokers," by Biddle, on p. 313, it is said:

"All the courts in England, and the great majority in the several States of the United States confederation, hold, that when it is clear that no delivery of the thing sold was ever intended but only a mere settlement of the differences, then the contract of sale is mere gambling, and the one party cannot recover the consideration, nor the other enforce on his side the execution of the contract. *The question of intention to deliver is for the jury.*" (The italics are mine.)

Neither in Dos Passos, nor in Biddle, is the result of the cases overstated, as against the legality of "deals" to be settled by the payment of "differences."

The remarks in Biddle, which I have italicised, will be found, I think, to be aimed at the Supreme Court of his own State, Pennsylvania, which had in North *vs.* Phillips, 89 Pa. St. 260, Buchisky *vs.* DeHaven, 38 Leg. Intel. 115, and Smith *vs.* Thomas, 38 Leg. Intel. 115, disregarded the finding of the jury in favor of the brokers on questions of fact, affecting the legality of the transactions.

Dos Passos also agrees with Biddle in his criticisms upon the Pa. decisions, and in his conclusion that the question of gaming or not, is for the jury.

He says in his work, p. 434:

"Third: But, in any event, the question as to whether a particular transaction constitutes a wager, is one for the jury; and this well settled rule, although laid down in Smith *vs.* Bouvier, (70 Pa. St. 325) has been ruthlessly violated by the Pennsylvania courts in the cases referred to."

The Supreme Court of Wisconsin, in Barnard *vs.* Backhaus, 52 Wis. on p. 599, said, speaking of contracts for future delivery:

"Therefore a contract to deliver at a future day is not necessarily a wagering or gambling contract. But when such a contract is made as a cover for gambling, without any intention to deliver or receive the grain, but merely to pay and receive the differences between the price agreed upon and the market price at such future day, then it comes within the statute of gaming and is not in law. Courts, in the main, are in accord in regard to these legal principles. If any diversity of views is found to exist, it is rather in the application of the law to the particular facts than as to the law itself."

In the following cases the question has been considered and substantially the same conclusion reached, as stated above:

Lyons *vs.* Culbertson, 83 Ill. 33.
Bigelow *vs.* Benedict, 70 N. Y. 202.
Exparte Young, 6 Biss. 53.

Re Green, 7 Biss. 338.

Clark *vs.* Foss, 7 Biss. 540.

Kingsbury *vs.* Kirwan, 43, N. Y. Sup. Ct. 451.

Rudolf *vs.* Winters, 7 Neb. 125.

Pickering *vs.* Cease, 79 Ill. 328.

Rumsey *vs* Berry, 65 Maine 570.

Waterman *vs.* Buckland, 1 Mo. App. 445.

Yerkes *vs.* Salomon, 18 N Y. Sup. (11 Hun.) Ct. 471.

Logan *vs.* Musick, 81 Ill. 415.

Gregory *vs.* Wendell, 39 Mich. 337.

Gregory *vs.* Wendell, 40 Mich.

Everingham *vs.* Meighan, Sup. Ct. Wis. Aug. term, 1882, 13 N. W. Rep. 269.

Lowe Bros. *vs.* Young, Sup. Ct. Iowa, Sept. 22, 1882, Vol. 13, N. W. Rep. 329.

Bruas' Appeal, 55 Pa. St. 294.

Kirkpatrick *vs.* Bonsall, 72 Pa. St. 155.

Grizewood *vs.* Blane, 11 C. B. 526. 73 E. C. L. 526.

Matter of Chandler, U. S. Dist. Ct. N. D. Ill. 13 Am. Law, Reg. 310 (May, 1874.)

North *vs.* Phillips, 89 Pa. St. 250.

Dickson's Exr's. *vs.* Thomas, 97 Pa. St. 278 (10 weekly notes of cases 112) (38 Leg. Int. 115.)

Ruchizky *vs.* De Haven, 97 Pa. St. 202 (10 weekly notes of cases 109) (38 Leg. Int. 115.)

Fareira *vs.* Gabell, 89 Pa. St. 89.

Melchert *vs.* Am. Un. Tel. Co. 11 Fed. Rep. 193, and note by Francis Wharton, on p. 201.

Bartlett *vs.* Smith, 13 Fed. Rep. 263.

Tenney *vs.* Foote, 4 Brad. (Ill.) 594.

Noyes *vs.* Spaulding, 27 Vt. 420.

Sampson *vs.* Shaw, 101 Mass. 145.

Ex Parte Marnham, 2 De G. F. and J. 624.

Rourke *vs.* Short, 34 Eng. L. and Eq. 219.

Doxy *vs.* Spaids, 8 Ill. App. 549.

Commercial Bank *vs.* Spaids, 8 Ill. App. 493.
Kingsbury *vs.* Kirwan, 77 N. Y. 612.
Shaw *vs.* Clark, Sup. Ct., Mich. 13 N. W. Rep. 786.

The Statute of Illinois, in force when the transactions in question occurred, was as follows:

Rev. St. 1874, pp. 372, 373, §183, (Rev. St. Cothran's Ed, 1881, Ch. 38 § 130.)

"Whoever contracts to have or give to himself or another the option to sell or buy at a future time, any grain, or other commodity, stock of any railroad or other company, shall be fined not less than $10, nor more than $,1000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts and shall be void."

Under this section were decided:

Pickering *vs.* Cease, 79 Ill. 328.
Pixley *vs.* Boynton, 79 Ill. 351.
Sanburn *vs.* Benedict, 79 Ill. 309.
Walcott *vs.* Heath, 78 Ill. 433.
Cole *vs.* Milmine, 88 Ill. 349.

Also Melchert *vs.* Am. Un. Tel. Co. 11 Fed. Rep. 193.
Jackson *vs.* Foote, 12 Fed. Rep. 37.

Where actual delivery is intended, the contract is not void.

Clark *vs.* Foss, 7 Bissell 540.
Cole *vs.* Milmine, 88 Ill. 349.
Phillips *vs.* Ocmulgee Mills, 55 Geo. 633.
Banks *vs.* McDougall, 28 U. C. C. P. 345.
Smith *vs.* Bouvier, 70 Pa. St. 325.

McIlvaine *vs.* Egerton, 2 Robertson 422.
Stanton *vs.* Small, 3 Sanford 230.
Brown *vs.* Speyers, 20 Gratt. (Va.) 296.
Cassard *vs.* Hinman, 1 Bosworth 207.
Ashton *vs.* Dakin, 4 Hurl. and Nor. 867.
Sawyer *vs.* Taggart, 14 Bush. (Ky.) 727.
Cameron *vs.* Durkheim, 55 N. Y. 425.

The fact that there is an option as to the time of delivery, does not render a contract void, if the sale is *bona fide*.

Logan *vs.* Musick, 81 Ill. 415.
Gilbert *vs.* Gauger, 10 Chi. Leg. N. 340.
Gregory *vs.* Wattoma, Sup. Ct. Iowa (June, 1882.)

In fact almost all the cases above cited, sustain this proposition, which is itself indisputable.

Nor is the contract void from the mere fact that at the time it is made, the seller had not the goods on hand, if the sale is an actual *bona fide* one, and not a mere disguise to cover gaming.

Cases above cited, also:
Hibblewhite *vs.* McMorine, 5 M. and W. 462.
Mortimer *vs.* McMorine, 6 M. and W. 58.
Morris *vs.* Tumbridge, 83 N. Y. 92.
Barnard *vs.* Backhaus, 52 Wis. 593.

The form of the contract is not conclusive, but parol evidence is admissable to show what the real intentions of the parties were. And if, from the acts and conduct of the parties it appears, that notwithstanding the form of the contract, the real intention of the parties was to settle by the payment of differences, the contract is a gaming one and void.

Dos Passos, p. 477.
Yerkes *vs.* Salomon, 11 Hun. (N. Y.) 471 (18 N. Y. Sup. Ct. 471.)
Story *vs* Salomon, 71 N. Y. 420.
Hibblewhite *vs.* McMorine, 5 M. and W. 466.
North *vs.* Phillips, 89 Pa. St. 250.
Smith *vs.* Thomas, 97 Pa. St. 278.
Barnard *vs.* Backhaus, 52 Wis. 593.
Bartlett *vs.* Smith 13 Fed. Rep. 263 (per Nelson D. J.)
Melchert *vs.* Am. Un. Tel. Co. 11 Fed. Rep. 193 (per Love, D. J.)
Gilbert *vs.* Cook, Cr. Ct. Shelby Co. Tenn.

Ch. Leg. News for February 28, 1880. This, although a *nis prius* case, seems well considered.

See also:
McCulloch *vs.* Girard, 4 Wash. C. C. 289.
Pyne *vs.* Campbell, 6 El. and Black 370.
Wallis *vs.* Littell, 11 C. B. N. S. 369.

The only case I have found denying the last preceding proposition is:

Porter *vs.* Viets, 1 Biss. 177.

In this last named case Drummond, C. J., holds, that proof could not be allowed, to show that a contract unexceptionable on its face, was in reality a gaming contract, that "no case has been shown" authorizing a man to do that by verbal proof.

This case is undoubtedly in conflict with all the authorities, and stands alone.

Dos Passos so admits, p. 477. note 3.

Contracts to be settled by the payment of differences, though gaming at common law, are not within the Illinois Statute against gaming, so as to avoid negotiable securities given in settlement of losses in the hands of innocent purchasers without notice, though void as between the parties.

Jackson *vs.* Foote, 12 Fed. Rep. 37 (per Blodgett, D. J.)

To the same effect in substance see Shaw *vs.* Clark, Sup. Ct. Mich. above cited.

But in Tenney *vs.* Foote, 4 Ill., App 594, (4 Bradf. Ill., 594,) the opposite view of the Statute is taken, and a negotiable security taken in settlement of such contracts, was held void in the hands of an innocent purchaser without notice.

Though it is doubtless true, that the cases above cited, do not comprise all that can be found bearing upon the question of the validity of transactions, such as those with which we are now concerned, yet I think no well considered case can be found here or in England, laying down principles different in the main, from those established in the foregoing cases.

We are now, I think, prepared to consider the question, whether the court below was right, when it held that there was no evidence to impeach the legality of the transactions in which plaintiffs and defendants were engaged, and withdrew the consideration of that question from the jury.

Perhaps, however, before proceeding further, a single remark respecting the state of the mind of the learned judge who tried this cause, when he entered upon the trial of it, may be pardoned.

In Clark *vs.* Foss, 7 Biss., 540, he said he has "a strong predilection in favor of holding men of full age and right mind to their contracts deliberately entered into, upon full and adequate money considerations, without deceit or imposition, and when the consequences of their contracts, however ill-advised, are mainly personal to themselves."

Respecting the use of this language, I adopt the criticism of counsel for the defendant in Barnard *vs.* Backhaus, *supra.* In their brief in that case they say, that by this language the judge seems "to waive the considerations of public policy, the basis upon which gaming contracts are set aside." The man of "full age and right mind" who passes over his money to the winner at a faro bank or at a horse-race, does so "deliberately" and "without deceit or imposition" and the apparent consequences are "mainly personal to" himself, yet this court cannot ignore the questions of public policy and good morals which underlie the legislation and judicial determinations on the subject of gambling, for any such considerations. Neither can it sanction such contracts that there is a money consideration involved—passed from one to another."

In his charge to the jury in this case the same "strong predilection" appears, for he says, p. 67,

"There can be no question from the evidence, that the contracts were entered into by the defendant through the plaintiffs as his agents or brokers and members of the Board of Trade in Chicago, for speculation, the object being to purchase wheat, corn, oats, pork and lard, for future delivery, and hold it for a rise in the market."

Further on, on the same page, he said:

"It might not be prudent for the defendant to enter into such business but it was neither unlawful nor immoral. The evidence is that these contracts were made by the plaintiffs with other parties in their own name, according to a universal custom prevailing upon the Board of Trade, but were made, in fact, by the plaintiffs as the brokers and agents of the defendant, for his benefit and advantage and under his directions."

The strength of this "predilection" on the part of the learned judge led him to the conclusion, that because the plaintiffs said they bought and sold the property, and said they expected to receive and deliver it, therefore it was conclusively proved that they did, and the jury were not at liberty to doubt or disbelieve them in that respect. For fear, indeed, the jury might do so, not having his predilection, he wholly withdrew the question from them and forbade them to consider it at all.

He totally ignored the facts, that plaintiffs admitted that they never had any instructions from defendant, as to whether the property they bought or sold was to be delivered or received or not.

That without such instructions, they in no single instance received or delivered any property whatever for him or on his account.

That in every instance his gains and losses were settled by the payment of differences.

That they did not claim or pretend that in a single instance any property was even offered to be delivered to or by them on any of those contracts.

That they admitted that the defendant's deals, his gains and losses, were all actually settled in the mode prevailing on 'Change in Chicago, p. 56.

That they admitted that the largest portion of their customers bought and sold without intention to receive the property, but to settle gains and losses by the payment of differences, p. 48.

That they admitted that a large proportion of the "deals" on 'Change in Chicago, were settled by a payment of differences merely.

That they refused to deny even, that nine hundred and ninety-nine "deals" out of a thousand on 'Change in Chicago were settled without delivery, and simply by a payment of differences.

According to his view, their acts, and the acts of those with whom they claimed to have dealt, done while the transactions were in progress, were nothing. Even their statements of account, showing in every instance the payment or receipt of differences in settlement and in no instance a delivery, their letter of Feb. 12, p. 16, in answer to that of defendant of Feb. 9, p. 14, were all nothing, and the statements they made as to what they expected and intended, made after the fact, and while on the stand as witnesses, were everything.

So "strong" was his "predilection" that he even ignored what he himself said in Clark *vs.* Foss, *supra*, that "in the absence of more convincing testimony, what the parties actually did, is pretty good evidence of what they intended to do." And in this case he held, practically—that what the parties "*actually did*," was no evidence at all of "what they intended to do."

Perhaps, however, the apparant puzzle may be solved, by observing that in Clark *vs.* Foss, it was the actual delivery of 20,000 bushels of corn, and a delivery or tender of warehouse receipts for 10,000 bushels more, which were the acts, which the parties "actually did," which were in the eyes of the learned judge "pretty good evidence of what they intended to do." It may, I think, be doubted whether, in view of his rulings in this case, the fact that there had never been any delivery or offer to deliver any property in that case, if that had been the fact would, on account of his "strong predilection" have amounted to any evidence at all in the eyes of the judge, to contradict the avowed intentions of the brokers.

In short, taking that case and this together, it may, I think, be understood, that in the mind of the learned judge, the statements of parties that they did not expect delivery of the property contracted for, and bought without any intention of receiving it, may be successfully contradicted by showing an actual delivery of part at least of such property, and in such case, what parties "actually did is pretty good evidence of what they intended to do." While, on the other hand, the fact that none of the property included in a long list of transactions, was ever delivered or offered to be delivered, but all of the "deals" were settled by the brokers by the mere payment of "differences," without instructions from the client, and in pursuance of the usual course of dealing on 'Change in Chicago, even though nine hundred and ninety-nine thousandths of such deals are there so settled, is no evidence at all, not even a scintilla, to contradict the statement of the brokers, that in all such cases the property is bought with the understanding and expectation that it will be delivered.

I suppose that in the mind of the learned judge, it would be no evidence at all, to contradict statements made by the brokers, that all purchases on 'Change were made with the expectation that the property would be delivered by the seller, and with the intention to receive it by the buyer, if it were shown by the admissions of the same brokers, that none of the property so bought or sold was ever in fact delivered.

For if the admission of the brokers that a large proportion of the deals on 'Change are settled by the mere payment of differences and without delivery, even though such proportion be ninety-nine one hundredths. Four hundred and ninety-nine five hundredths, or even nine hundred and ninety-nine one thousandths of the whole, furnishes no evidence at all, of an implied understanding among the brokers on 'Change, that deals shall be so settled, to contradict their statements on the stand as witnesses, and plaintiffs, in an action brought by them to recover such differences, it is hard to see how proof that *all* such deals were so settled, could be said to amount to any evidence of such implied understanding, to contradict the statements of the brokers that there was no such understanding.

If in the one case, when the brokers say they expect the delivery of the property they buy, and if it is not delivered, it is because it is gotten rid of "by some of those systems before the end of the month," (p. 51, testimony of Smith,) their statement is conclusive of the fact, that they do expect the delivery of the property, and therefore the contract is lawful, notwithstanding that in nine hundred and ninety nine cases out of a thousand it is not so delivered, why should not the same statement be conclusive, even though it be shown that in fact no property so bought is ever delivered?

If the several systems of "getting rid of" the property without delivery, may be successfully invoked in one case, why not in the other?

I submit that the difference between the delivery of the one thousandth part of the whole, and no part of it all, is a very slender difference upon which to take this case from the jury, if in the latter case it would be the duty of the court to let the case go the jury.

I know, and freely admit, that the question here is, not what mental peculiarity of the learned judge led him to withdraw this case from the jury, but was his doing so justified by the evidence in the case.

The question is, is there in the record really no evidence, tending to impeach the legality of the transactions here involved? If not, the court was right. If there is, the court was wrong.

I insist that the evidence in the cause, the testimony of the plaintiffs themselves, conclusively shows, that within the rules laid down in the cases above cited, in this country, and in England, all the transactions between the plaintiffs and defendant, out of which this case has arisen, are simply and purely gambling ones. And I have ventured to make the foregoing suggestions, respecting the mental peculiarities of the learned judge who tried it in the court below, to explain, what might otherwise seem inexplicable, the extraordinary difference between the view which he took of the evidence in this case, and that taken of similar testimony by the courts in many of the cases above cited. Indeed, I think there is no well considered case to be found, in which any similar view is taken of similar testimony.

In Barnard *vs.* Backhaus *supra*. Cole, C. J., said, p. 599:

"But it is the manifest duty of courts to scrutinize closely these time contracts, and determine whether they were really intended by the parties to be what their language imports—real contracts for future sale and delivery of grain—or whether, in fact, they were mere bets, or wagers on its price at some distant day. It will not do to attach too much weight or importance to the mere form of the instrument, for it is quite certain that parties will be astute in concealing their intentions, and the real nature of the transaction, if it be illegal. It may safely be assumed that parties will make such contracts valid in form; but courts must not be deceived by what appears on the face of the agreement. It is often necessary to go behind or outside of the words of the contract—to look into the facts and circumstances which attended the making of it—in order to ascertain whether it was intended as a *bona fide* purchase and sale of property, or was only colorable. And to justify a court in upholding such an agreement, it is not too much to require a party claiming rights under it, to make it satisfactorily and affirmatively appear that the contract was made with an actual view to the delivery and receipt of grain, not as an evasion of the statute against gaming, or as cover for a gambling transaction."

In that case the trial court found, see p. 601, "That at the time these various contracts were made, there was no understanding, or agreement, that the delivery of the grain or the payment of the price should be waived or forgiven;" substantially as the learned judge who tried this case found.

The findings of the trial court, in that case were as in this, in favor of the validity of the transactions there involved, which were substantially similar to those involved in this. The brokers in that case had been as astute as they were in this. The contracts there, were in form—as valid as in this. Nevertheless the Supreme Court, in pursuance of the principles above stated, went behind the mere form and inquired into the substance of the contracts, and being satisfied that the form was used as a mere cover for gambling, reversed the judgment of the trial court as to the facts upon which it was based, and ordered the complaint dismissed.

The above cause was tried in the County Court prior to the trial of this. Was decided on the appeal June 23, 1880, and the *per curiam* decision, found on p 597, was then announced. To write the opinion fell to the lot of the then Chief Justice Ryan. But he died without having prepared it. The opinion actually pronounced was, as will be seen, prepared by the present Chief Justice Cole.

In Lyon *vs.* Culbertson, 83 Ill. 33, the court said:

"The fact that no wheat was offered or demanded, shows, we think, that neither party expected the delivery of any wheat, but in case of default in keeping margins good, or even at the time for delivery, they only expected to settle the contract on the basis of differences, without either performing, or offering to perform, his part of the agreement; and if this was the agreement, it was only gaming on the price of wheat, and if such gambling transactions shall be permitted, it must eventually lead to what are called corners, which engulf hundreds in utter ruin, derange and unsettle prices, and operate injuriously on the fair and legitimate trader in grain, as well as the producer, and are pernicious and highly demoralizing to trade. A contract to be thus settled is no more than a bet on the price of grain during, or at the end of a limited period. If the one party is not to deliver, or the other to receive, the grain, it is, in all but name, a gambling on the price of the commodity, and the change of name never changes the quality, or nature of things."

And on p. 39 the court said: "The statute has prohibited, under heavy penalties, the sale of wheat on so-called options to buy or sell grain, because of its pernicious tendency; but it seems to us, that these contracts, for the sale of grain, where neither party intends to perform them, but simply to cancel them before, or at their maturity, and pay differences—are as injurious to trade and fully as immoral as are the sales of options. Neither belong to fair legitimate trade.

In Gregory *vs.* Wendell 39 Mich., 337, the Court said, p. 341: "But where the parties at the time of entering into an agreement for the purchase and sale, apparently, of goods for future delivery, agree that no title to any property shall pass and that nothing shall be delivered, no delivery made; or where from the nature of the transaction, and the manner and method of carrying on the business, it is apparent that such was the intention of the parties, although not expressed, but the agreement or understanding was that at the time fixed for delivery, they should settle upon a basis of the then market price of the commodity, by the losing party paying to the other the difference, such an agreement would be one that the law would not recognize or enforce. It would not constitute a sale or an agreement to sell property of any kind, but one to speculate upon the prices that certain property would bring at some future day."

On pp. 343 & 4 the Court said: "There were some suspicious facts and circumstances in this case. The weight thereof, or the proper conclusion of the whole case, it is not for the Court to determine. The whole case, under proper instructions, should have been submitted to the jury, and the Court erred in withdrawing the case from them."

In **Melchert** *vs.* the **Am. Un. Tel. Co.**, *supra*, the Court said, p. 195: "The question is, What was the intention of the parties in the inception of the contract? For if in its inception the contract was *bona fide*—if it was the true intent of the parties that the property should be in fact delivered —it could be no valid objection that they afterwards, at the time for delivery arranged the controversy between them by the payment of the difference between the contract and market prices. Nevertheless, the subsequent conduct of the parties in dealing with the contract—in adjusting, settling and fulfilling it—may often, as evidence, cast strong reflected light upon their original intentions in making it."

On p. 196 the Court said: "In seeking to ascertain the intentions of parties to such transactions as the one under consideration, it is evident that it will not do to place any great stress upon the mere terms of their contract, or upon their own declarations, whether under oath or not. Parties to such contracts will always seek to give them the form and semblance of legality, and all our experience admonishes us to receive with extreme caution, if not absolute distrust, what parties charged with transactions apparently illegal, say, respecting the innocency of their intentions."

The Court then cited with approval the language of Cole, C. J., in **Barnard** *vs.* **Backhaus**, above cited, and then said, p. 197: "We must look at the actions of interested or accused parties, rather than mere words, to ascertain their real intentions. We must consider what they have done rather than what they have said, when called to account for their actions. We can best learn what interpretations the parties themselves have put upon their own contract, by considering what they have done under and in pursuance of it, with a view to its settlement or fulfillment."

I trust it may not be considered impertinent if I remark, that the language just quoted embodies most excellent sense as well as unquestionably good law.

Further the Court said, p 199: "But was any rye delivered or intended to be delivered by either party, or was it their understanding that their respective contracts should be settled and satisfied by the payment of differences? *How can we judge of their intentions except by considering what they actually did in adjusting their contracts?* Is it not just to conclude in the absence of proof to the contrary, that parties to a contract adjusted according to their understanding of their own intentions in making it? There is no evidence that either Gerstenburg or Wright & Co. ever bought or owned a bushel of rye to deliver under their contracts. They settled by the payment of differences. It is perfectly evident that it was Gerstenberg's purpose, in the purchase of the 15,000 bushels from Wright & Co., to lay the foundation of a settlement in that way. Neither he nor Wright & Co., had evidently the least idea of investing money on these respective purchases for actual delivery."

In Bartlett *vs.* Smith, 13 Fed. Rep. the court said, on p. 266: "It may be this is all sham. It may be these parties have entered into contracts of this character, and instead of going into the market, have merely drawn up between third parties and themselves, contracts, which upon their face purport to be the purchase and sale of wheat, when it was never intended to be an actual delivery of wheat at all. If this is so, then it is a gambling transaction. The court will say, "We will not aid you to enforce it." If there be any loss in the transaction the party who loses cannot recover."

And, on p. 268, the Court said in its charge to the jury, "The form, however, of these contracts (which on their face specify wheat to be delivered) is not conclusive of their character. You must look into the transactions themselves, and determine from the testimony, and the facts and circumstances attending the making of the contracts, and the conduct of the parties with reference to them, whether the contracts are illegal and void within the rule laid down, or whether they are *bona fide*," &c.

In Lowe *vs.* Young, the Supreme court of Iowa said, (p. 332, N. W. Rep. Vol. 13.)

"It is claimed, that the finding of the jury, that the transactions on the Board of Trade of Chicago, by plaintiffs for J. C. Pike, were gambling transactions, is altogether without support in the evidence. The question was submitted to the jury under the proper instructions. It appears quite clearly, from the testimony, that Pike neither expected to deliver nor rereceive, the commodities sold or purchased, but that he simply expected to receive or pay the differences in price upon final settlement. *There is no direct testimony that the plaintiffs had the same intention. It does appear, however, that settlements were usually, if not always, made either by paying or receiving the differences in price. The articles sold or purchased were not, in fact, delivered. The jury was authorized to find the intention of the plaintiffs by the course of dealing between the parties.* The verdict, in our opinion, cannot be disturbed as unsupported by the testimony."

These quotations might be extended, but perhaps I have already spent more time in quoting them than was necessary or proper.

The views of the power and duty of the Court there laid down, certainly differ widely from the views announced in this case by the learned judge who presided at the trial.

In this case the learned judge said in substance, to these so-called brokers in Chicago and elsewhere: If men of mature age want you to help them gamble, it is all right. Rely upon it, the Courts will not interfere, provided only that you make your contracts among yourselves apparently fair and valid on their faces. As soon as you show that you make your contracts in that form, and then come upon the stand as witnesses and say that you "expect" the property you nominally buy and sell to be delivered, that is the end of the inquiry. No meddling court or jury can inquire further. Or if they do inquire further, no matter what they find, it cannot affect the validity of your contracts.

No matter though, by means of the facilities you offer for gambling, you induce unwary men, and women even, all over the country to risk their earnings in dealing in options on margins with, the result of ruin to them, and princely incomes, without risk, to yourselves. No matter though for your own selfish ends, you help the unscrupulous speculator to oppress and ruin the honest trader in grain and produce, by forcing the market up to-day and down to-morrow, as shall best enable him, to take from the trader, without toil and without risk, his hard earnings. No matter that your "margins" and your "differences" render "corners" possible, and that without you and your facilities they would be impossible. No matter though in the train of your operations stalk financial ruin, crime and suicide.

Only see to it, that your operations are based upon contracts, which upon their face import actual purchases and sales, and be ready, all of you brokers, when called upon to help each other, to swear, that, although you never in fact deliver, you nevertheless always expect to do so, and that is the end of the inquiry. No one but yourselves can tell what your actual intentions are. It all depends upon what you say they are. There is no possible way in which you can be contradicted. What you do is nothing. What you say you mean to do is everything. The fact that you never do it furnishes no evidence at all that you did not mean to.

It will be seen that most of the opinions and instructions from which I have quoted above, have been delivered since this cause was tried in the Circuit Court.

Courts located in the midst of the evils growing out of these 'deals,' or "operations" on 'Change cannot shut their eyes to the true character of the transactions. That they fully appreciate the magnitude of the evils which flow from the facilities for gambling under the disguise of legitimate business afforded by these brokers on 'Change, and the modes in which they there transact what they call business, but which is really the most pernicious of all kinds of gambling, is sufficiently evident from the language they have used in deciding those cases.

Perhaps at the time this case was tried, the learned judge who tried it was not as strongly impressed as the judges of the other courts seem to have been, with the extent to which this mania for gambling on 'Change had spread throughout the country, nor the magnitude of the evils it had worked. It is fair to suppose that if he had been, his rulings would not have differed from theirs.

The plaintiffs admitted, p. 49, that some of defendant's gains and losses were settled by the "payment of differences," but they asserted, and for a long time stubbornly insisted, that some of them were settled by delivery. And as I have shown above, it was only after they were challenged and required to produce their books, and show from them a settlement by delivery, that they admitted, most reluctantly and with many attempts at evasion of the question, that in no instance was any trade of his settled by delivery.

It is not hard to understand why they struggled to show that some "deals" were settled by delivery.

Their counsel could not have been ignorant, and the plaintiffs themselves are presumed to have known that, by the cases above cited which had then been decided, the law was settled—if the law can ever be said to be settled by adjudicated cases—that "trades" or "deals" which are understood to be settled by the payment of "differences," are gaming contracts and void, and that the fact that "trades" or "deals" are so settled is some evidence at least, that they were intended to be so settled when made, notwithstanding the contracts do not on their faces provide for such mode of settlement, but for settlement by delivery; and notwithstanding that parties say, that the understanding actually was, what the contracts on their faces import, and that there was no contrary or different understanding.

They must have possessed logical acuteness enough to see, that if the fact that part of the contracts were settled by "differences," was *some evidence* of an understanding, that they should be so settled, when they were made, the fact that all of them were actually so settled, would furnish strong, if not conclusive, evidence of such intention.

"Acts speak louder than words," it is said, and they clearly understood that when they testified.

If they could have foreseen that the "strong predilection" of the learned judge, would lead him to ignore the old adage, and decide as he did, in effect, that acts were not evidence in his court, and words only entitled to consideration, they would not have spent hours of time, and occupied pages of the record, as they did, in evading a direct and truthful answer to that simple question. An evasion continued, it will be seen, even after they had examined their books, and knew the truth, if they did not know it before.

They clearly felt the force of their acts, even if the court did not, as it seems he did not.

They doubtless appreciated the difficulty the jury would be likely to find in believing, that without any instructions whatever from the defendant on the subject, they would or could even, have settled all his "deals" without delivery, and by a mere payment of differences, without some implied, if unexpressed, understanding between them and the parties with whom they made the "trades" for him, that they should be so settled, notwithstanding their denials that such was the fact.

Especially, in view of their statement, that his deals were settled in accordance with the custom then prevailing on 'Change, and their refusal to deny that nine hundred and ninety-nine thousandths of the deals there made, were in fact so settled.

It will be observed further, that the case contains no hint of any special, or indeed any negotiations being required, or had, to bring about the settlement of defendant's deals without delivery, but they were clearly settled in that way, as the regular thing.

Moreover, neither the correspondence, nor the oral proof, contains a word of inquiry by plaintiffs to defendant how he wanted his deals settled, nor any information whatever as to how they had settled them. And he says he knew nothing about it.

In short, they knew when they testified, that they understood from the beginning, that defendant meant to deal in options to be settled by differences, because that was what their customers usually did. They knew, also, that it was all the time their intention to help him do this, for that was their trade. They knew, also, that, judged by the rules prescribed by the courts of their own State, it was his purpose to gamble, and theirs to help him do it, for the sake of the commissions they would thereby earn, and which they could not earn unless they did so. They knew he did not want, or mean to buy or pay for, the actual property they nominally bought for him, and therefore they did not receive any of it for him.

They knew that they and defendant were simply gambling, and they feared that the jury would say so by their verdict if the whole facts should appear, and therefore they struggled long and hard to suppress them or part of them, and to make it appear that some at least of his transactions were not gaming ones.

How much trouble they might have saved themselves had they known the predilection of the learned judge in their favor.

That the transactions were gaming ones, and were so intended by plaintiffs and defendant, is beyond question.

But it will probably be argued that even if this be conceded, it is not gambling, unless both buyer and seller concur in the intention to gamble. That if either of them buys or sells with the actual intent to deliver or receive, the contract is valid, no matter what the intentions of the other party may have been.

This is conceded to be the law, so far as the legality of the contract between the seller and the buyer is concerned, when the suit is brought by the innocent party. Williams *vs.* Tiedemann, 6 Mo. App. 269.

But there are two reasons why that argument has no application to this case.

First, it has no application to the facts.

The contracts—the plaintiffs say—could not have been settled without delivery, unless with the consent of the other party to them. But they were so settled. Therefore that consent was obtained in each case.

They were so settled in pursuance of the custom prevailing on 'Change, and in pursuance of which a very large proportion of the contracts there made, are settled.

These facts raise at least a strong presumption, that there was always the implied understanding that they should be so settled.

The plaintiffs clearly made them with that intention.

The other party was in every instance a broker, like the plaintiffs, working, like them, for reward, and presumed to be interested in carrying out the wishes of his client. The plaintiffs settled in that way, without consulting their client, and without instructions from him, and in the manner customary on 'Change.

As it was such custom to so settle, and as such other parties to the contracts did so settle, the irresistible presumption is that they, like the plaintiffs, were so authorized, or felt themselves to be so.

To offset these facts and this presumption, we have only the general statement of the plaintiffs that there is no understanding that contracts shall be settled otherwise than by delivery, and that in every case the parties have the right to insist on delivery, and that unless the property is gotten rid of through the clearing house, or in some other way, before the end of the month, it is delivered.

There is no claim that the contracts made for defendant, differed from the ordinary contracts made and settled on 'Change. As all of these were, and ninety-nine one-hundredths, at least, of all the rest, are settled in that way, how is it possible to escape the conclusion that all such contracts are made with the implied understanding, that they may be so settled?

All these so-called contracts were settled in the way that is declared to be gaming. As then both parties to all these contracts did gamble, it certainly affords a strong, if not irresistible inference, that they meant to do so.

At the very least it is some evidence that they did.

The Court then was wrong in saying (p. 71) "There is no testimony in the case to show that the other parties to the contract in Chicago, had any understanding that the contract was not to be performed according to its terms."

There was such evidence, and its effect should have been submitted to the jury.

Mau *vs.* Suelflohn, 45 Wis. 438.

Phœnix Mut. Life Insurance Co. *vs.* Doster, 1 U. S. Sup. C't. Reporter 18.

It is the province of the jury, not the court, to draw inferences from testimony.

Townley *vs.* C. M. & St. P. R'y Co. 53 Wis. 626.

Again, there is a broad distinction between the question of the right of a party to a contract, who entered into it *bona fide*, without any intent to gamble, to enforce it, notwithstanding the other party entered into it with the purpose of gambling; and the question of the right of a broker, who, as here, admits that he knew his client wanted to gamble under the disguise of honest business, who, for promised reward, aided such client to gamble, who admits, that so far as he and his client were concerned, all contracts were gambling ones, and settled as such, when suing for his reward, and for losses alleged to have been incurred by paying differences arising in such gambling operations. To be heard to assert as a reason why he ought to recover, that his client has not shown as a fact, that the other party to each of those several contracts, in his secret heart meant to gamble, when in fact he did so.

"In Gilbert *vs.* Cook, in the Cir. C't. for Shelby Co., Tenn., above cited, Judge Pierce said: "If the plaintiffs were consciously engaged, though but as agents, and not as principals, in assisting the defendant to gamble in prices, they can have no *status* in a Tennessee court to recover any moneys advanced in the pursuit of such enterprise."

At any rate, it being certain that the contracts made by plaintiffs were, and so far as they were concerned were intended to be, mere gaming contracts. There being no pretense that there was ever a change of purpose on their part after they were made and before they were settled. Their purpose clearly having been to make for the defendant gaming contracts on 'Change, which he could not make for himself, and thereby assist him in gambling, for the sake of the commissions they charged for their assistance. Courts will not go out of their way to find reasons for relieving them from consequences of their conduct.

It being shown that they meant to gamble. That all the contracts were actually settled in the way that has been adjudged to be gambling, presumptions that the other parties to such contracts did not mean to gamble, will not be indulged in to help them out.

In Barnard *vs.* Backhaus, *supra*, the Supreme Court of Wisconsin said, p. 600: "And to justify a Court in upholding such an agreement, it is not too much to require a party claiming rights under it, to make it satisfactorily amd affirmatively appear that the contract was made with an actual view to the delivery and receipt of grain, not as an evasion of the statute against gaming, or as a cover for a gambling transaction."

IV.

If any of the assignments of error above argued are well taken, the Court was wrong in overruling the motion for a new trial. If not, it was right.

I shall therefore spend no time in argument under this head.

I submit that for the reasons above pointed out the judgment of the Circuit Court was clearly wrong and must be reversed.

W. E. CARTER,
Attorney for Plaintiff in Error.

108-269

OFFICE SUPREME COURT U.S.
FILED
MAR 15 1883
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1882.

No. 234.

JOHN H. ROUNTREE,
Plaintiff in Error,
vs.
ERNEST F. SMITH *et al.*,
Defendants in Error.

Error to the Circuit Court of the United States for the Western District of Wisconsin.

Brief and Points for Defendants in Error.

LAWRENCE, CAMPBELL & LAWRENCE,
FOR DEFENDANTS IN ERROR.

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH ST., CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1882.

No. 234.

JOHN H. ROUNTREE, *Plaintiff in Error,*		Error to the Circuit Court of the United States for the Western District of Wisconsin
vs.		
ERNEST F. SMITH *et al., Defendants in Error.*		

Brief and Points for Defendants in Error.

This action was brought at the September term, 1879, of the United States Circuit court for the Western district of Wisconsin by the defendants in error, Smith & Lightner, against John H. Rountree, the plaintiff in error. The plaintiffs below recovered a judgment for $5,614.46, to which judgment the defendant below has prosecuted a writ of error.

The following state of facts appears from the record: On February 2, 1879, Rountree, then a resident of Wisconsin, was in the city of Chicago, and saw there the firm of Smith & Lightner, who were members of the Board of Trade, and, as partners, doing the usual brokerage and commission business upon said board. Rountree instructed them to buy for him 1,000 barrels of pork, for which he promised to send them the margin upon his return home.

On February 3 they bought for him 750 barrels, and advised him of the same by telegraph, and on the next day he sent them $500 as a margin, with a telegram saying he would like to purchase more.

The statement of the bill of exceptions, as found on page 12 of the printed record, is as follows:

" A correspondence by letter and telegram between the " parties ensued, and the letters and telegrams from both " parties were read in evidence. The substance of them " down to February 5th, was: Instructions by defendant to " purchase pork and lard; remittances of money for mar- " gins on purchases, and on the part of the plaintiffs noti- " fications of purchases made for defendant, the state of " the market and the probabilities, in their opinion, as " to the future prices of the commodities."

The telegrams and letters are given in the record, and show a series of purchases and sales by the plaintiffs under the direction of Rountree, which continued until April 23. During all this period, the market had been steadily sinking, with occasional reactions, and on that day Smith & Lightner had advanced $3,475 over and above the margin which they had received from Rountree. They wrote him several times urgently requesting him to make good his account, which he declined to do, and finally, according to the rules of the board, they sold the pork and corn which they were carrying for him, and closed the account.

Upon his continued refusal to repay them the money they had advanced for him, this suit was brought, and terminated as already stated.

It appears from the evidence in the record that the reason given by Rountree, at the time, for not repaying the amount of their advances was, that he claimed to have notified them on the 11th of March, that he would not run any risk beyond the amount of money already advanced by him in the way of margins.

The only witnesses upon the trial were the parties, Smith & Lightner and Rountree. The latter does does not claim that he ever gave any notification of this sort in writing, but says he made such statement to the plaintiff verbally, while he was in Chicago. This is denied by both Smith and Lightner, but even if it were true, it would, of course, be perfectly immaterial. Rountree does not pretend, himself, that they ever assented to any such arrangement, or that he did anything further, being frightened at the condition of the market, than to say to them he would not run any risk beyond the amount of money already in their hands, which was simply equivalent to saying he would not pay whatever might be the amount of his indebtedness at the time the transaction should be closed; and he admits that, after making such statement to them on March 11, as he claims to have done, he went on directing them to make purchases for him, which they continued to do.

Of course, a mere *notice* from him to them that he should not consider himself responsible for the result of past transactions beyond the amount of margins already in their hands, was a mere idle waste of words. Nothing could release him from his liability, except their consent, founded upon a valid consideration. This matter is, therefore, entirely settled by the special verdict of the jury.

We extract the following from their verdict, to be found on page 10 of the record: "And we further find, in an-"swer to certain special questions submitted to us by the "court, as follows:

"*First.* Did the defendant notify the plaintiffs, or "either of them, on or about March 11, 1879, that he "would not be responsible for any money beyond the "amount of money they then had in their hands belong-"ing to him?

"A. Yes.

"*Second.* If he did so notify them, or either of them, "state, if you are able, whether the amount of money he "then had in their hands was sufficient to cover all losses "he had then sustained?

"A. We are unable to state.

"*Third.* If you find that the defendant did so notify "the plaintiffs, as submitted in the first question, was there "any mutual understanding or contract between the plain-"tiffs and defendant on or about March 11, 1879, that the "defendant should not be held liable on the contracts "made on his behalf by the plaintiffs, beyond the amount "of money then already placed by the defendant in the "plaintiffs hands."

"A. No.

"*Fourth.* If you find there was such a contract or "understanding between the parties, as is mentioned in "the last question, did the defendant, by his subsequent "acts, declarations, directions or conduct, waive the same

"and become liable for further losses incurred over and
"above the money so placed in the plaintiffs hands?

"A. Yes."

The finding, then, of the jury disposed effectually of this pretended defense, viz: the finding that there was no mutual understanding or contract that the defendant should not be held liable beyond the amount of money already advanced by him to the plaintiffs in the way of margin; and, secondly, that if there had been such a contract or understanding, it was waived by the subsequent dealings between the parties.

The whole case upon the printed record seems so plain a case for the appellees that we are somewhat at a loss to ascertain upon what grounds the learned counsel for plaintiff in error proposes to seek from this court a judgment of reversal.

We will, however, briefly discuss the questions which we suppose will be raised by opposing counsel.

It appears on page 66 of the printed record that at the conclusion of the testimony, and before the argument of the case to the jury, the defendant's counsel asked the court to direct the jury to find a special verdict, whereupon the court proceeded to frame questions to submit to the jury, and thereupon the plaintiff's counsel moved the court not to submit to said jury any question or questions respecting the legality of the contract or contracts between said plaintiffs and said defendant. The court, after argument, decided that "there was no evidence in the case "to impeach the legality of the contract or contracts be-"tween the plaintiffs and the defendant, and the legality "of the transactions between them, out of which the ac-"tion had grown, that said contracts were fair and legal "contracts and transactions, and were not gambling or "betting contracts on transactions;" and the court further ruled that "he would not submit to said jury any question respecting, or allow the jury to consider, the alleged "illegality of the said contract and transactions as set up "in the defendant's answer."

We presume it will be urged by counsel for plaintiffs in error that in this action of the court there was error; but we submit to your Honors that the court was clearly right in its position.

In the case of *Bevans* v. *U. S.*, 13 Wall., 62, the court said:

"The objection that the jury was instructed to find for "the plaintiffs the amount claimed by the papers given in "evidence (viz: the official settlements), with interest "thereon, is entirely without merit. There was no evidence to impeach the accounts stated, or to show set-off, "release, or payment. The instruction was, therefore, "in accordance with the legal effect of the evidence, and "there were no disputed facts upon which the jury could "pass."

Whether the contracts were legal or illegal, there being no dispute about the facts, was, of course, a question for the decision of the court, and when the counsel for defendants admitted, as he did on the trial (page 53 of printed record), that "if plaintiffs are entitled to recover "at all, they are entitled to recover as follows:

"For cash balance or advances....	$4,168 75
" " commissions................	1,243 75
"Total............	$5,412 50"

the court might, with propriety, have directed the jury to find for that amount, as was done in the case just cited.

Was their any dispute about the facts?

None, whatever, so far as related to any material matter, and certainly none in regard to any matter touching the validity of the contracts.

We have not seen the argument for plaintiff in error, but we infer from the record that his counsel will insist the contracts were gambling contracts. It was claimed by the defendant in his answer (so called under the code of Wisconsin) to the plaintiffs' complaint, that it was never intended or expected by the defendant or the plaintiffs, that any of the articles bought and sold should be delivered, but that the contracts were to be settled and closed by the payment of the difference in value in the market price at the time of buying, and at the time of settling, that is to say, the agreement between Rountree, as the principal in this transaction, and Smith & Lightner, as his agents and brokers, was that Smith & Lightner should not make any *bona fide* purchases or any *bona fide* sales, but that they should only speculate for Rountree in differences of value.

As we have already said, there were but three witnesses sworn at the trial, the plaintiffs and the defendant. Now, Rountree himself testifies, as appears upon page 59 of the printed record, as follows:

" *There was never a word said between them and me respecting the delivery of the property bought by them for me.* I had no conversation with them respecting the manner in which this business was to be done, nor respecting the manner in which my gains or losses were to be settled or adjusted, except what is to be found in the correspondence."

This is in precise accord with the testimony of both Smith and Lightner. They were simply employed by him, as brokers, to buy and sell various articles of commerce on the floor of the Board of Trade, and when instructed to buy them bought, and when instructed to sell they sold, without any special understanding to take the case out of the ordinary course of business. The court, therefore, was perfectly right in not leaving to the jury the question whether the contract between the parties, as to the terms of which there was no doubt upon the evidence, was in itself a legal contract or not. He told the jury it was a legal contract. The commencement of the charge by the court, as given on page 67 of the record, is as follows:

"The court has already held that upon one of the issues "made by the answer, there is not evidence in the case on "the part of the defendant from which the jury could "find in his favor upon that issue. The contracts are valid "on their face, and there is no sufficient testimony in the "case upon which the jury could find that there was any "understanding between the parties to the contracts, either "between the plaintiffs and the parties between whom "they contracted in Chicago, or between them and the "defendant, or between the parties with whom they "contracted and the defendant, other than appears on the "face of the contracts. The plaintiffs both swear that they "had no other understanding, and that they each under-"stood that both parties had the right to insist upon an "actual delivery in every case, according to the terms of "the contract. The defendant does not swear that he "understood that there was to be no delivery, or that the "contracts were to be settled by an adjustment and pay-"ment of the differences without delivery of the property, but "says, in substance, that he had no understanding about "it, and there is no testimony in the case to show "that the other parties to the contract in Chicago had "any understanding that the contract was not to be performed according to its terms. There is nothing in the "case, then, from which the jury would be authorized to "find that the contracts were gambling contracts and "void."

There is certainly no error in this. It was a perfectly correct statement of the evidence. Whatever might have been the law, if it had been previously understood between all the parties concerned that there was to be no actual delivery of the property bought and sold, yet, as all parties concerned testified there was no such understanding, it certainly was not error in the court to say to the jury that they need not perplex themselves over that issue.

Did the court err in deciding this contract to be a legal contract under the undisputed facts of the case? The contract was made in the city of Chicago, and was there to be performed. It is therefore governed, as to its validity, by the law of Illinois; and although the contract is clearly valid wherever the English common law prevails, yet, inasmuch as its validity has been so directly settled by the decisions of the Supreme court of Illinois, we shall content ourselves with referring to several of these decisions as authority. We shall first, however, quote from a statute in the State of Illinois, then and now in force, intended for preventing gambling by means of contracts, as we anticipate this statute will be cited by opposite counsel, and perhaps a construction sought to be given to it which it will not bear, and which has not been sanctioned by the Supreme court of the state.

The 130th section of our Criminal Code is as follows:

"GAMBLING IN GRAIN, ETC."

"Whoever contracts to have or give to himself or an-"other the option to sell or buy, at a future time, any "grain or other commodity, stock of any railroad or other "company, or gold, or forestalls the market by spreading "false rumors to influence the price of commodities therein, "or corners the market, or attempts to do so in relation to "any of such commodities, shall be fined not less than $10 "nor more than $1,000, or confined in the county jail not "exceeding one year, or both; and all contracts made in "violation of this section shall be considered gambling "contracts, and shall be void."

It may possibly be contended by counsel for plaintiff in error, as it has sometimes been contended in this state, that this statute was intended to prohibit contracts for a future delivery of grain or other commodities. The contrary has been decided by the Supreme court of this state, and this court will see at a glance that the statute cannot be made to bear any such construction. It says: "Who-"ever contracts to have or give to himself or another *an* "*option* to sell or buy at a future time any grain, etc."

It is not the sale of grain for future delivery that is forbidden, but the sale of an *option* either to sell or buy at a certain price at a future day. This statute simply prohibits what are known in the peculiar language of the exchange as "puts" and "calls."

If A agrees with B that at a future day A shall have the option of delivering or not delivering to B 10,000 bushels of corn at a certain price, for which right of option he pays B a valuable consideration, this is called a "put." If, on the other hand, it is agreed between A and

B for a valuable consideration that on a certain future day A shall have the right to *call*, if he so chooses, upon B for the delivery of 10,000 bushels of grain at a certain price, this is denominated a "call," and these two kinds of contracts are the class of bargains which are intended to be prohibited by the statute; that is, the option of buying or the option of selling, at a certain price, at a future day.

But the statute no more prohibits a *bona fide* bargain for the delivery of grain at a future time and at a certain price, than does the common law.

There is no pretense that in the present case the parties were dealing with options, or "puts" and "calls." These commission merchants had received an order from the appellant, Rountree, first, to buy 1,000 barrels of pork, then, to buy a certain quantity of grain, and at times directions were given to sell, and all this continued from the second day of February till towards the end of the month of April. They abided the orders of their principal both in buying and selling, and when they bought they bought in good faith, taking contracts upon which they could compel a delivery of the property *in specie* to them, and when they sold gave contracts on which they could be compelled to deliver the property *in specie* to the purchaser.

It does not appear that the property was not delivered in every instance, but it is wholly immaterial whether it was actually delivered or not, if the contracts were made with a view to a delivery, and the vendor, at the time of the maturity of the contract, was ready to deliver, and instead of delivering, he settled with the purchasers by paying the difference between the then value of the article sold, and the price at which it had been sold a month before.

The case of *Wolcott* v. *Heath*, 78 Ills., 436, was a case like the present one between parties occupying the same relation to each other as the plaintiffs and defendant in the present case. The controversy was between a person residing in the country and his brokers on the board of trade in Chicago, who had been buying and selling commodities for him precisely as Smith & Lightner were doing for Rountree. The controversy related to the state of accounts between them, and this is what the court says:

"Plaintiff now insists the alleged purchases and sales "made by defendants for him, on the Board of Trade, "were all fictitious; that no grain was, in fact, bought or "sold, and hence all the contracts in relation thereto were "void, under the common law, as being inhibited by a "sound public policy. Whatever these contracts were, "they were not made between plaintiff and defendants, "but by defendants, as agents for plaintiff, with third par- "ties, on the board of trade. The indebtedness of defend- "ants consists of advances made by them in those trans- "actions for plaintiff, at his request and upon his express "promise to reimburse them. We will not, at this time, "discuss the question whether the agents would be de- "barred from recovering from their principal for advances "made at his request, if it be conceded the enterprises in "which the principal was engaged were so far unlawful "that contracts in regard thereto could not be enforced. "The evidence in this record is by no means conclusive "that the contracts for grain, made by defendants for "plaintiff were unlawful. They were made in the regular "course of business, and, for anything that appears in this "record, they could have been enforced in the courts. It "is true, they were time contracts; that is, the seller had "all of the month in which to deliver the grain; but the "testimony of Wolcott is, they were *bona fide* contracts "for the actual purchase of the grain. The only option "the seller had was as to the time of delivery. The obligation was, to deliver the grain at all events, but it was "the seller's privilege or option to deliver it at any time "before the closing of business on the last day of the "month.

"Time contracts, made in good faith, for the future delivery of grain or any other commodity, are not prohibited by the common law nor any statute of this state, "nor by any policy beneficial to the public welfare. "Such a restraint would limit commercial transactions to "such a degree as could not but be prejudicial to the best "interests of trade. Our present statute was not in force "when these dealings were had; consequently the rights "of the parties are not affected by it. What the law "prohibits, and what is deemed detrimental to the public "interests, is, speculations in differences in market values, "called, perhaps, in the peculiar language of the dealers, "'puts' and 'calls,' which simply means a privilege to "deliver or receive the grain, or not, at the seller's or buyer's options. It is against such fictitious, gambling "transactions, we apprehend, the penalties of the law are "leveled."

Mutato nomine, this opinion might have been written for the case at bar.

We ask the attention of the court to the last paragraph of the foregoing quotation as to the construction of our statutes.

"What the law prohibits, and what is deemed detrimental to the public interests, is speculations in differ-

"ences in market values, called, perhaps, in the peculiar "language of the dealers 'puts' and 'calls,' which "simply means a privilege to deliver or receive the grain "or thing at the seller's or buyer's option. It is against "such fictitious gambling transactions we apprehend the "penalties of the law are leveled."

It is not pretended by any evidence in the present case that the purchases made by Smith & Lightner partook of this character in the slightest degree.

Mr. Smith testifies, page 41 of printed record, speaking of the account of purchases rendered Rountree:

"They were actual purchases of the article specified in "the contract in each instance. All these contracts were "made in the name of the firm. All dealings on the "Board of Trade are done in the name of the commission "merchant, and he signs the contracts if we want it, and "we sell to the commission merchant and sign the con- "tract if he wants it, so that the dealing is all done in the "name of the commission merchant. That is the rule of "the board. If we bought anything for any month, we "expected it to be delivered, and there is no other under- "standing between commission merchants but whatever "they buy is to be delivered. That was the case in ref- "erence to all the purchases we made for Mr. Rountree. "We had no understanding or agreement between us and "Mr. Rountree of any other character than that."

And on pages 51 and 52 we find the testimony of Mr. Lightner, as follows:

"Some of the lard we bought for Mr. Rountree came "into our actual possession, and I think we have some of it "now. * * * When we bought the property we ex- "pected to receive it, if it was not sold in the meantime."

"* * * I have looked over the account. It represents "actual purchases and sales in all instances, and the bal- "ance is as stated by this account."

On page 51 of the printed record we find the testimony of Mr. Smith, as follows:

"In dealing on the Board of Trade an order comes in to "us to purchase. We have no means of knowing what "the intention of the party is, whether he intends to re- "ceive the actual property or wishes to have it held or sell "it at a margin. We act under instructions. We go "and buy at the ordinary price, and with instructions to "sell we sell without limit. If there is a profit or loss, it "goes to the credit or debit of our customers.

"There is no understanding between brokers on the "board that the article purchased is not to be delivered. "There was not in any instance where purchases were "made for Mr. Rountree any such understanding between "us and the brokers. The understanding was that when "the time came the stuff would have to be delivered. "We remain liable on our contracts until after the actual "delivery to the purchaser.

"The word 'options' in these contracts means if grain "is bought for April delivery it is called option. That is, "a man sells property and has the privilege of delivering "it any time during the month he sees fit, but it must be "delivered between nine and half-past two. The delivery "is effected by warehouse receipts. They produce the "warehouse receipts and the money is paid for them.

"The only option is seller's. All the option is "the time of delivery. Buyer's option is not in use any "more, and was not then in use.

"In disposing of Mr. Rountree's property we did so "as he directed, in many instances, and in other instances "we sold on notice to him, as shown in our correspondence."

In re-cross-examination the witness testified as follows:

"Q. Do you want this jury to understand that you "actually receive all the goods you buy in that month?

"A. We do if we hold it till the end of the month."

In *Pixley* v. *Boynton*, 79 Ill., 352, the contract of sale was in the same form with those given in the record. The court, in its opinion, speaks as follows:

"A number of witnesses familiar with the rules of the "Board of Trade were examined, and they all say this "contract was in conformity with the custom of trade, "and was a regular and legitimate contract. 'Seller' "the month, as that term is understood and used on the "Board of Trade, is explained to mean the seller has until "the last day of the month in which to make a delivery "of any grain contracted to be sold. Under such a "contract, as we understand the evidence, all the option "the seller has is the privilege to deliver the grain at any "time before the maturity of the contract. This is nothing "more than a time contract, which is regarded on the "Board of Trade and elsewhere as a legitimate and regular "contract. Time contracts in relation to grain, as well as "other commodities, are of a daily occurrence, and must "necessarily be in commercial transactions."

"One witness says: 'The true idea of an 'option' is "'puts' and 'calls.' A 'put' is defined in the evidence to be "'a privilege of delivering or not delivering the grain,' "and a 'call' is 'a privilege of calling or not calling for "the grain.' The contract between the parties to this "transaction was not an optional one, in the sense of 'puts "and calls.' The only option the seller had was as to "the time of the delivery. The legal effect of his agree-"ment was that he should deliver the grain contracted to "be sold within a limited period."

The case of *Lyon* v. *Culbertson, Blair & Co.*, 83 Ills., 34, may possibly be cited by opposite counsel. That was simply a suit between two members of the Board of Trade, one of whom had sold to the other 10,000 bushels of wheat, and not receiving payment at the time the contract matured, he brought suit for the price of the wheat. The court held that the plaintiff could not recover because the evidence showed that the plaintiff did not offer to perform, on his part, or expect to perform or had the ability to perform; and the court further held that the evidence showed it was not the expectation of either party when the contract was made that it should be performed. That was a litigation directly between the seller and the buyer, and the question upon which the case turned was whether upon the evidence the contract was entered into by the parties as a mere betting upon the price to be settled by the payment of the differences. But in the case at bar the commission merchants are simply suing the defendant to recover money that they have actually paid at his request upon contracts entered into under his instructions, and for his profit, and it is entirely immaterial whether, in the purchases made by them for him of different commodities on the Board of Trade of Chicago, they closed out the purchases by an actual receipt of the commodities bought, and a re-sale of them to somebody else, or whether they closed out by a settlement of the differences in value.

They have actually paid for articles bought at his request, and they have suffered a certain loss in closing up the transactions, for which their principal is morally and legally responsible.

The case of *Cole* v. *Milmine*, 88 Ill., 349, is precisely like the one at bar. It was a suit to recover money paid by a broker on the board upon wheat bought for the defendant, who had given his two notes in settlement. When suit was brought on the notes, he set up that the wheat bought for him was not intended to be delivered, and that it was a gambling transaction.

The following is the opinion of the court—brief, but much to the point: "This action was brought on two "promissory notes given in settlement of a deal in wheat "between the parties, and the defense sought to be made "is that it was in the nature of a gambling transaction, "and hence void under our statute.

"That some slight errors occurred on the trial, both in "the admission of evidence and in the giving of instruc-"tions, is apparent; but it is so clearly proven the notes "in suit were given for losses on wheat actually bought "by plaintiffs for defendants, that we cannot believe the "slight errors complained of tended, in any degree, to "produce the verdict that was rendered. The evidence "is, the wheat was, in fact, purchased and paid for on ac-"count of defendants, and the fact it was to be delivered "at a future day agreed upon did not bring it within the "prohibition of the statute. Defendants could have had "the wheat delivered to them if they had so elected. "The fact defendants gave their notes in settlement is a "concession the wheat was bought for them, and if not "illegal, the contract was binding upon them. That it "was a *bona fide* purchase is proven by a great prepon-"derance of the evidence. The judgment will be "affirmed."

It is manifest from the cases we have cited that, in the State courts of Illinois, the contracts in this case would be held valid, and that there is nothing whatever in the evidence affecting them with the taint of gaming.

The case upon the record seems so plain as to excite the suspicion that the writ of error was sued out for delay, and to justify us in asking for an affirmance with damages.

LAWRENCE, CAMPBELL & LAWRENCE,
Att'ys for Deft. in Error.

C. B. LAWRENCE, *of Counsel.*

OFFICE SUPREME COURT U.S.
FILED
MAR 31 1883
H. McKENNEY,

108-269

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1882.

JOHN H. ROUNTREE,
Plaintiff in Error,
v.
ERNEST F. SMITH ET AL.

No. 234.
Error to the Circuit Court of the United States for the Western District of Wisconsin.

BRIEF AND POINTS FOR DEFENDANTS IN ERROR.

FRANCIS H. KALES,
For Defendants in Error.

CHICAGO:
PRINTED BY THE CHICAGO LEGAL NEWS COMPANY, NOS. 47 AND 49 DEARBORN STREET.
1883.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1882.

JOHN H. ROUNTREE, *Plaintiff in Error,* *v.* ERNEST F. SMITH ET AL.	***No. 234.*** *Error to the Circuit Court of the United States for the Western District of Wisconsin.*

BRIEF AND POINTS FOR DEFENDANTS IN ERROR.

STATEMENT OF CASE.

Counsel for the defendant in error not having as yet been furnished with the brief of the other side, will endeavor to state the case as it appears by the record.

In February, 1879, and afterward, the defendants in error, who were plaintiffs below, did business in the city of Chicago as partners under the name of Smith & Lightner. They were brokers transacting business on the Chicago Board of Trade and were engaged in purchasing and selling grain, pork and lard, and were transacting a general commission business. The plaintiff in error then resided in the State of Wisconsin and came to Chicago, where he made an agreement with Smith & Lightner as factors or brokers on the Chicago Board of Trade, for the purchase and sale of property. Under that agreement Smith & Lightner bought and sold for account of Rountree, the plaintiff in error, between the months of February and May, 1879, large amounts of property on which they made advances of money for his account which were in part repaid by him, but leaving a balance against him on that account and for commissions on the 29th of April, 1879, of the sum of $5,412.50; which balance, on the trial, the plaintiff in error admitted the defendants were entitled to recover, provided they were entitled to recover anything. Rec. pp. 52-3.

From this balance against Rountree it appears the Chicago market went against him and brought him in debt to his brokers.

Rountree afterward refused to pay the amount claimed by Smith & Lightner, to be their due, and, on the 8th of August, 1879, they brought their action against him in the Circuit Court of the United States for the Western District of Wisconsin for the same. In their declaration they counted for moneys paid, laid out and expended by them to the defendant's use; and for work, labor and services performed and rendered by them to the defendant at his special instance and request; and they also counted on an agreement between them and the defendant, which is in substance set forth in the declaration as follows, to wit:

That on or about the 2d day of February, 1879, the defendant came to Chicago and there employed said firm of Smith & Lightner to purchase and also to sell for his account, grain of various kinds and also pork and lard, and to make advances thereon of money for his account for which he agreed to pay the firm reasonable commissions by way of compensation on purchases and sales which they might make for his account.

The details of this agreement between the parties are stated in the evidence of Rountree, the plaintiff in error, Rec. pp. 58 to 63; and by Smith, one of the defendants here, Rec. pp. 11–12; and also by Lightner, the other defendant in error, pp. 51–2; the remainder of the evidence of this agreement, and what was done thereunder by the parties, is found in the correspondence between them, extending from February 3, 1879, to May 10, of that year, set forth in the record, pages 12 to 40, inclusive.

To this complaint or declaration the defendant filed certain pleas which, on being analyzed, seem to amount to the following:

1st. The general issue or denial, &c.

2d. That on the 11th of March, 1879, the defendant "gave notice to the plaintiffs that he had "no more money to put up or pay over for margins "and that he would not pay or advance another dol-"lar, or invest, or be, or become liable for another "dollar in or about the transactions, or any of "them."

These and some further statements or allegations quite as indefinite, are supposed to be relied on and are here treated as a plea that on the 11th of March the defendant Rountree revoked the authority of his brokers to further buy or sell property for his account; and lastly,

3d. That the causes of action stated in the complaint, and all the transactions in that behalf, were gambling transactions in the price of the commodities which the plaintiff bought or purported to buy or sell for the defendant.

Afterward, at the December Term, 1879, the case came on for trial, and, after hearing the evidence and the instructions of the court, the jury assessed the plaintiffs' damages at the sum of $5,614.46—being the amount, with interest, which the defendant at the trial admitted the plaintiffs were, as before stated, entitled to recover if entitled to recover at all. Rec. pp. 10, 52–3.

On the trial the evidence tended to show that the defendant had employed the plaintiffs as brokers to buy and sell property on the Chicago Board of Trade in the due and regular course of business. That at the defendant's instance the plaintiffs purchased and sold property for future delivery for their principal who was operating in that market as a trader. That in all cases of sales delivery was to be made in a given month, and the seller, but not the buyer in any case, had the option of fixing any time during such month to make the delivery; but if he did not do so his obligation to deliver at the end of the month became absolute. Rec. pp. 51, 41, 43.

The general form of these contracts made between brokers on the Board, whether in writing or not, is set forth in the Record, p. 41. Contracts of the form set forth in the Record, and with the above interpretation, are, and always have been, sanctioned by the courts of the state of Illinois where the contracts in this case were made. In this connection, it is to be observed that the court in charging the jury (p. 67) says:

"The defendant does not swear that he understood "that there was to be no delivery or that the con-"tracts were to be settled by an adjustment and pay-

"ment of the differences without delivery of the "property, but says in substance that he had no un-"derstanding about it; and there is no testimony in "the case to show that the other parties to the con-"tract, in Chicago, had any understanding that the "contract was not to be performed according to its "terms."

This statement of the court is borne out by a reference to the testimony of Rountree, p. 59, where he says:

> I had no conversation with them respecting the manner in which this business was to be done, nor respecting the manner in which my gains or losses were to be settled or adjusted, except what is to be found in the correspondence. I believe I have related everything that passed between them and me relating to my obligations to them, or money transactions with them, or manner of doing business, except what appears from the letters and telegrams. I was frequently on the Board of Trade with the gentlemen, one or the other of them, most frequently with Mr. Smith, and I could not say that they did not buy anything for me, and I could not say that they did. I have no particular recollection as to how they bought or who they bought for. I have no recollection. They never notified me orally or personally that they had received or were liable to receive any of the goods. I knew nothing of the manner in which they bought and sold. They may have given me the prices they paid or agreed to pay, the matter not being fixed on my mind. I have no recollection about it. *I could not say that I had any understanding on thes ubject of the nature and character of the Board of Trade deals, whether the propertu was to be actually delivered or whether it was to be settled for;* nothing was ever delivered to me.

It also appears from the evidence that Rountree had previously operated as the buyer and seller of property on the Chicago Board of Trade and may therefore be presumed to have been acquainted with its customs and usages, whether he in fact knew them or not.

The RULE in relation to contracts for the purchase and sale of property for future delivery and the putting up of margins to secure the fulfillment of such contracts, is set out in the Record p. 65.

SMITH on this subject testified as follows:

Business on the Board of Trade is done in the name of the brokers entirely. The names of the customers are not known to the dealers at all, except to the person who gives the order. When they give us an order to purchase we purchase; and to sell, we sell. If he had chosen then to close the transaction up, if the sale had been profit, he would have received his money; and afterwards, if the market price of that article should fall ten or fifteen per cent., they would call on us for margins. Our liability continued for the purchase till the actual delivery. Mr. Rountree would have been out of the contract for a month before, and we would have been liable for it till the delivery a month after. That is so in all cases on the Board of Trade. In dealing on the Board of Trade an order comes in to us to purchase. We have no means of knowing what the intention of the party is, whether he intends to receive the actual property or wishes to have it held or sell it at a margin. We act under instructions. We go and buy at the ordinary price, and, with instructions to sell, we sell without limit. If there is a profit or loss it goes to the credit or debit of our customers.

There is no understanding between brokers on the Board that the article purchased is not to be delivered. There was not in any instance where purchases were made for Mr. Rountree any such understanding between us and the brokers. The understanding was that when the time came the stuff would have to be delivered. We remain liable on our contractors until after the actual delivery to the purchaser.

The word "options" in these contracts means, if grain is bought for April delivery it is called option. That is, a man sells property and has the privilege of delivering it any time during the month he sees fit; but it must be delivered between nine and half-past two. The delivery is effected by warehouse receipts. They produce the warehouse receipts, and the money is paid for them.

The *only option* is seller's. All the option is, *the time of delivery.* Buyer's option is not in use any more, and was not then in use.

In disposing of Mr. Rountree's property, we did so as he directed in many instances, and in other instances we sold on notice to him, as shown in our correspondence. Rec. pp. 50–51.

Lightner's testimony (Rec. 51–2) is also to the same effect. He says:

I had some talk with defendant in relation to his having dealt on the Board of Trade through any other firm before. He told me he had traded through Messrs. Rumsey Bros. He had bought pork and lard through them on the Board of Trade. * * * There was no understanding or agreement in any of the purchases made by me for Mr. Rountree, between myself and Mr. Rountree, that [we] had not to take the articles or that they were not to be delivered. The subject was never in any way alluded to between him and me. When we bought the property we expected to receive it if it was not sold in the meantime.

It further appears from the evidence, without contradiction, that the brokers in the purchases and sales made for account of their principal, bargained for an actual delivery of property, and not for the payment of differences; and that they transacted the business in this manner, making or taking delivery, as the case might be, excepting where, by the direction of their principal, they had sold the property they bought for him before the time when the same was deliverable under their contract with the parties from whom they had purchased it. Rec. p. 52.

The testimony of Smith, Lightner and Rountree, part of which is above referred to, is, it is believed, all the evidence in the record bearing upon the legality or illegality of the contracts of purchase and sale made by Smith & Lightner.

At the conclusion of the testimony on both sides, and after hearing the parties, and before argument to the jury, the court held that there was no evidence in the case to impeach the legality either of the contract or contracts between the plaintiffs and the defendant, or of the transactions between them out of which the action had arisen, and the court therefore declined to submit to the jury any question respecting the illegality of the contracts. To this ruling the defendant excepted, Rec. p. 66. And the court further, in its charge to the jury, told them in substance that there was nothing in the case from which the jury would be authorized to find that the contracts were gambling contracts and void, as alleged in the defendant's plea; but, on the contrary, that the jury should take the contracts as they appeared on their face, some of them being in writing, some not, but all of them being alike in substance and form, and, on their face, valid in law, p. 67; to which (p. 71) the defendant excepted, pp. 66 and 72.

The residue of the charge of the court relates to the question whether about March 11, 1879, the defendant terminated the relation of agency between himself and Smith & Lightner; or whether, if he then gave them notice to that effect, he afterward by his conduct waived the same.

The charge of the court, covering this and the other questions in the case, is fully set forth in the Record, pp. 67 to 70. Nearly every paragraph of this charge is separately excepted to; and it would seem that this is done whether the parts excepted to contain a proposition of law or not.

The court, besides its general charge to the jury, at the same time propounded *four special questions* to be answered by them in addition to their general verdict, to which they gave answer, as follows:

First.—Did the defendant notify the plaintiffs, or either of them, on or about March 11th, 1879, that he would not be responsible for any money beyond the amounts of money they then had in their hands belonging to him? Answer. Yes.

Second.—If he did so notify them, or either of them, state, if you are able, whether the amount of money he then had in their hands was sufficient to cover all losses he had then sustained? Answer. We are unable to state.

Third.—If you find that the defendant did so notify the plaintiffs as submitted in the first question, was there any mutual understanding or contract between the plaintiffs and defendant, on or about the 11th of March, 1879, that the defendant should not be held liable on the contracts made on his behalf by the plaintiffs beyond the amount of money then already placed by the defendant in the plaintiffs' hands? Answer. No.

Fourth.—If you find there was such a contract or understanding between the parties as is mentioned in the last question, did the defendant, by his subsequent acts, declarations, directions, or conduct, waive the same and become liable for further losses incurred over and above the money so placed in the plaintiffs' hands? Answer. Yes.

To each of the foregoing questions the defendant excepted; and this constitutes the defendant's *fifth* exception (Rec. pp. 66-7), where the questions and exceptions are set forth.

On the trial below the plaintiff in error, in reference to the admission and exclusion of evidence, took exceptions as follows:

1. Question by defendant's counsel: There is a statement in your letter that Armour & Co. were going to do something. Is it not a practice among such men as Armour & Co. and Hutchinson & Co. and other houses to "bull" and "bear" the market, as it is called? To this question, the plaintiffs, by their counsel objected, and the court sustained the objection, etc., and the defendant excepted. Rec. p. 46.

2. Question. What class of persons do you do business for on 'Change as a rule? Are they parties buying for the purpose of speculation? Objected to by plaintiffs and excluded, to which the defendant excepted. Rec. p. 48.

3. On re-direct, plaintiffs' witness stated that his firm stood in good credit, and does now, in Chicago.

Question. Able to raise all the money you want in Chicago? The defendant objected. The court decided the witness might answer, and the defendant excepted to the ruling. Rec. p. 50.

The 4th exception is found on page 66 of the Record and relates to the refusal of the court to submit a special issue to the jury as to whether the contracts were of a gambling nature. This has already been noticed above, p. 8, and is covered by the 6th exception, Rec. p. 71-2. The remaining exceptions as before stated, relate to the charge to the jury and are found on pp. 72-74 of the Record.

On the question of fact whether the defendant below, about March 11, 1879, revoked the agency of Smith & Lightner, there is evidence in the record tending to show that he did about that time, give a notice that he would furnish no more money, or be further bound, and also, that he afterward disregarded the notice and kept on giving orders to, and trading through his brokers, as before. This is shown by the correspondence between Rountree and his brokers, beginning with a telegram March 16, 1879 (Rec. p. 23) and ending May 8, 1879, Rec. p. 35. Nor does Rountree in his evidence deny this, while it is further corroborated by the testimony of the other parties to the suit.

These questions were fairly submitted by the court to the jury, including the question whether, if such a notice was in fact, given, the defendant had or had not by his conduct waived the same.

In answer to the special questions submitted to the jury (Rec. p. 10) on these matters, they found that the defendant did give such a notice; and also, that the defendant did by his subsequent acts, etc., waive the same, and continue trading through his brokers.

The court in its charge told the jury, amongst other things, that if Rountree did give notice as he claimed, still that he could not thereby relieve himself from liability for any losses incurred prior to such notice; and therefore, that the court would ask the jury to make a special finding relative to that subject, which appears to be covered by the 2d and 3d questions (Rec. p. 10) propounded to the jury for an answer, in reply to which they found that they are unable to state whether the amount of money Rountree then (11th of March) had in the hands of his brokers was sufficient to cover all losses he had then sustained; and they further found that there was no mutual understanding or contract between

Rountree and his brokers to the effect that he should not be held liable on contracts made by him beyond the amount of money then already placed by him in their hands.

On this statement of the case it would seem the only questions material to be discussed here are:

1. Whether the court erred in instructing the jury that, upon the evidence, the defendant had failed to make out his first defense, namely: the illegality of the contracts in question. And

2. Whether the court erred in instructing the jury that, if the defendant gave notice to his brokers of the termination of their agency, still that he might by his acts, conduct, etc., waive the notice and continue to be bound equally as if he had not given it.

If these questions are resolved in favor of the defendants in error, it is submitted, that the other questions which might arise are immaterial, and that the judgment should be affirmed.

POINTS.

I.

It was the duty of the court below, on the evidence, to hold, and to instruct the jury, that the defendant had failed to make out his first plea, namely: that the contracts referred to were illegal and void as gambling contracts.

Phœnix, &c., Ins. Co. v. *Doster.*
Opinion filed by this Court, Oct. 23, 1882.

1. The principle of this and preceding cases decided by this court is, that wherever there is an entire failure on the part of the defendant to establish his plea, it is the duty of the court as a matter of law to withdraw the subject thereof from the consideration of the jury; and this rule was properly applied in the present case.

2. In this case there was nothing in the treaty between Rountree and his brokers, nor anything in the terms of the contracts made by his brokers on the Board of Trade, nor in the evidence, from which the alleged illegality could be inferred.

On the other hand, the form and terms of these contracts had previously, as respects legality, been upheld by the decisions of the Supreme Court of Illinois.

Wolcott v. *Heath*, 78 Ill. 433.
Sanborn v. *Benedict*, Ibid. 309.
Pixley v. *Boynton*, 79 id. 351.
Logan v. *Musick*, 81 id. 415.
Lyon v. *Culbertson*, 83 id. 33.
Pickering v. *Cease*, 79 id. 328.

These cases, most of which uphold like contracts made on the Board of Trade, proceed upon the ground that the sale of property is, under this form of contract, made at the time when the contract is entered into; but that delivery only is postponed with an option as to the time thereof. And where delivery is postponed to a future month *at the seller's option*, it is by these cases held that the only option he has is, as to the time of delivery; and that this may be made at any time before the closing of business on the last day of the designated month.

Wolcott v. *Heath*, *supra*, pp. 436–7.

In the case last cited, while the form of the contract between the brokers is not given in the report of the case, it can readily be ascertained by the references made to it in the opinion of the court at the pages quoted; the same observation applies to other cases cited above.

As respects the contracts in this case, the option is fully explained; and is shown by the evidence to be in fact or usage the same that the law implies.

(1) While such is the legal effect of contracts of this character when unexplained by evidence, still it is competent, under an issue made for that purpose, to receive evidence tending to show that such contracts were or were not mere covers for betting on the price of grain during a limited period.

Beveridge v. *Hewitt*, 8 Bradwell, p. 479. Approved in

Tenney v. *Foote*, 95 Ills. 99.

And a leading fact to establish the gaming character of such contracts is, that the parties did not contemplate either an actual sale or delivery of property, but a settlement of differences by the payment of money

It was upon this distinction that the cases of *Lyon* v. *Culbertson* and *Pickering* v. *Cease*, *supra*, were decided, and the contracts declared void.

3. At the trial there was no evidence tending to show that the contracts for the purchase and sale of property for the defendant's account, were not *bona fide*, or what, by their terms they purported to be, namely: transactions for the actual sale and delivery of property.

(1) But it is to be observed in any case, that the contracts in question were not between the brokers and their principal, but were contracts made by the brokers at the instance of their principal with other members of the Board of Trade; and these contracts were all performed by the delivery of actual property or the evidences thereof, either to the brokers or to those to whom they sold at the instance of their principal. Rec. p. 52. In such cases, where there was a profit, the same was carried to the credit of ROUNTREE; and where there was a loss, he was charged therewith by his brokers, and accounts were rendered to him accordingly.

Wolcott v. *Heath*, *supra*, p. 436.

(2) The plaintiff in error, prior to February, 1879, had transacted business of a like character on the Board of Trade, through other brokers; he must, therefore, be taken to have known the general and uniform custom or usage of that market; and, in employing the defendants in error he must be held to have intended that the business entrusted to them should be done according to the usage and custom of that market, whether he in fact knew of its usages and customs or not.

Bailey v. *Bensley*, 87 Ill. 556.

The evidence in this case, without conflict, shows that these brokers transacted the business of their principal in accordance with the usage and custom of the Chicago Board of Trade, and in the form and kind of contracts used in such transactions. Rec. p. 41.

4. The contracts material to be considered in this case were made in Chicago, where the same were to be performed.

They are, therefore, to be governed by the laws of Illinois, as expounded by the decisions of its courts, made prior to that time.

Bedford v. *Burton.*
Opinion filed in this Court, Nov. 13, 1882.

By the laws of Illinois the transactions disclosed by the record in this case are, it is submitted, legal and valid between the parties.

II.

The Circuit Court rightly instructed the jury that if Rountree gave notice to his brokers, as he claimed to have done, of the termination of their agency, still that he could by his acts, conduct, etc., waive the same, and continue to be bound equally as if he had given no notice.

1. The evidence warranted the court in giving this instruction, and the jury found, as matter of fact, that Rountree did give the notice, but that he did, by his subsequent acts, declarations, directions, and conduct, waive the same.

This issue of fact was fairly presented to the jury; and, in their general verdict as well as in their answer to the special questions propounded, they found that if Rountree gave notice, as he claimed, he afterward disregarded it, and kept on giving orders and doing business through his broker as before.

Authorities are unnecessary to show that the finding of the jury on this question is conclusive here.

2. It does not seem necessary, in this view, to specially notice the numerous exceptions taken by the plaintiff in error on the trial below. In most cases these exceptions seem to be in the nature of verbal criticisms upon the language employed by the court, rather than exceptions to the propositions of law contained in the charge. But there appears to be no expression in the charge which could have misled the jury in reference to the material issues upon which the case turned, and upon which they appear to have based their verdict.

It is respectfully submitted, therefore, that the judgment of the court below should be affirmed, etc.

FRANCIS H. KALES.